Mayban Trustees Bhd v CIMB Bank Bhd and other appeals

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02–2143 OF 2010, W-02–2151 OF 2010, W-02–2152 OF 2010 AND W-02–2187 OF 2010
JEFFREY TAN, AZAHAR MOHAMED AND AZIAH ALI JJCA
8 NOVEMBER 2011

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Banking — Banker and customer — Duty of bank as trustee — Issue of bonds to finance execution of contracts — Failure to hold revenue for bondholders — Whether bank entitled to indemnity from customer, bond issuer — Whether MTB was in breach of its statutory and contractual duties — Whether company's existing creditor bank (CIMB) liable as constructive trustee

D

Companies and Corporations — Bonds — Issue of bonds — Issue of bonds by company to finance execution of contracts — Pre-condition of bond issue that Mayban Trustees Bhd (MTB) would hold revenue from contracts as trustee — Bond lead arranger and MTB failed to control company's accounts before and after issuance of bonds — Whether bond lead arranger and MTB liable to bondholders — Whether company entitled to bondholders — Whether bond lead arranger and MTB entitled to indemnity from company — Whether exemption clauses would apply to defeat indemnity claim — Separate legal entity — Corporate veil — Lifting of — Whether there were reasons to pull aside corporate veil

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Pesaka Astana Sdn Bhd ('Pesaka') had applied for and obtained approval to issue *al-Bai Bithaman Ajil* bonds ('the bonds') to finance the execution of three government contracts it had been awarded. The security for those bonds was Pesaka's assignment of all revenue from the government contracts ('revenue') to Mayban Trustees Bhd ('MTB'), as trustee. MTB was duly appointed as trustee to hold the revenue for the bondholders, ie the revenue was to be ring fenced. However, Pesaka had assigned all the revenue to be earned from the government contracts to its commercial lenders, which included amongst others CIMB Bhd ('CIMB'). In order to assign the revenue to the bondholders, Pesaka as the bond issuer had to redeem the assignment from its commercial lenders. For these purposes, KAF Discounts Bhd ('KAF') stepped in as the bond lead arranger and issue agent for Pesaka. As bond lead arranger KAF was entrusted with ensuring that the ring fencing was in place before the issuance of the bonds. However, when the bonds were issued there was a total failure to have the ring fencing in place. Despite this, KAF entirely disbursed the funds received from those bonds to Pesaka and the revenue flowed into Pesaka's accounts with CIMB. Thus, MTB had no control of the revenue after the issuance of the bonds. Pesaka proceeded to fraudulently withdraw all the

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revenue in CIMB, notwithstanding that the revenue had been assigned and was no longer its property. As a result there was nothing left for the redemption of the bonds and the bondholders were left without payment. The bondholders then commenced an action against Pesaka, KAF, MTB and the majority shareholders of Pesaka but their action against Pesaka and the majority shareholders of Pesaka was amicably settled by a consent judgment. The bondholders were thus left with their action against KAF and MTB. Thereafter, KAF and MTB filed a claim for indemnity from Pesaka and the majority shareholders of Pesaka. At the same time MTB also filed a claim against CIMB for negligence and breach of trust. The trial judge awarded judgment to the bondholders in the sum claimed against KAF and MTB in the proportion of 60% and 40%; dismissed the claims made by KAF and MTB against Pesaka and the majority shareholders of Pesaka; and dismissed MTB's claim against CIMB. KAF and MTB appealed against those judgments claiming that the trial judge had erred in wholly exculpating Pesaka. MTB also appealed against the dismissal of its claim for damages from CIMB, while the bondholders cross-appealed against the trial judge's refusal to grant them pre-judgment interests. The present judgment was in respect of those four appeals and the singular cross-appeal.

Held, allowing KAF and MTB's appeals against Pesaka and the majority shareholders of Pesaka, MTB's appeal against CIMB and the bondholders' cross-appeal with penalty charges and costs:

(1) The trial judge had not erred in his finding that MTB could not escape blame for the loss. MTB took no assertive steps to control Pesaka's accounts before the issuance of the bonds and showed a total lack of urgency on its part. That was a serious lapse for which MTB ought to be held to account. Further, MTB had also failed in its statutory duties. In addition, KAF, the bond lead advisor, failed to appreciate that it could not issue the bonds without MTB being in control. Either KAF or MTB could have arrested the situation but both failed to carry out their statutory and contractual duties and thus both are equally liable. As such the appeals by KAF and MTB against the bondholders were dismissed with costs (see paras 25 & 29).

(2) The bondholders who were denied the use of their money from the date when the default was declared to the date of the judgment had suffered an actual loss which should have been compensated. As such, KAF and MTB were ordered to pay to the bondholders penalty charges at the rate of 3% on the judgment sum from the date when the default was declared to the date of the judgment and the costs of the cross-appeal (see para 39).

(3) KAF and MTB had claimed for a full indemnity from Pesaka on the basis of the exemption clauses in the subscription and facility agreement ('the agreement') executed by the parties but the trial judge had found that the

negligence of KAF and MTB disentitled them to any indemnity from Pesaka. This court held found that there was a total failure by the trial judge to enquire if those exemption clauses applied in the first place. KAF and MTB could not have intended that the exemption clauses would apply even when fraud by Pesaka had intervened to alter the circumstances in which those exemption clauses would ordinarily apply. If that had been intended, then it should have been expressed in clear and unmistakable terms in the agreement. However, upon a true construction of the exemption clauses it was found that they did not cover fraud by Pesaka (see paras 41–42 & 55).

(4) Further, KAF and MTB had incurred liability and loss solely because of Pesaka's willful act. In the circumstances of this case the consent judgment was neither a defence nor a substitute for the fact that Pesaka should not have touched the revenue. In the final analysis, the loss was all because of Pesaka's willful act and the trial judge should not have wholly exculpated Pesaka. Thus KAF and MTB should jointly bear one-third of the total loss of RM149,300,000 together with all penalty charges, while Pesaka should pay KAF and MTB the sum of two-thirds of this loss with penalty charges and costs (see paras 62–63).

(5) The majority shareholders of Pesaka were the controlling minds behind Pesaka and all major decisions were taken by one Dato' Mohd Rafie bin Sain ('Rafie'), as principal who had absolute control of Pesaka at all material times. As such there was justification to pull aside the corporate veil to ascertain the actual ownership of assets in Pesaka, and hold Rafie responsible for the acts of Pesaka. Justice demanded that Rafie and the other majority shareholders of Pesaka be ordered to indemnify MTB by paying two-thirds of RM149,3000,000 together with all penalty charges and costs (see paras 69–71).

(6) In MTB's appeal against CIMB, it was found that the trial judge had failed to appreciate that the relationship between Pesaka and CIMB was not that of a bank and ordinary customer. It was also not appreciated that CIMB should not have ignored the interests of the bondholders when it had actual knowledge that the revenue did not belong to Pesaka. CIMB knew that the revenue in the accounts belonged to the bondholders and was thus a constructive trustee of that revenue. As a constructive trustee it should not have allowed Pesaka to transfer the revenue out of the designated accounts. By permitting the transfer CIMB had permitted a breach of trust and breached its duty as a constructive trustee of the revenue. Thus, CIMB ought to indemnify MTB to the extent of one-third of the total liability that MTB would bear (see paras 84–85).

[Bahasa Malaysia summary

Pesaka Astana Sdn Bhd ('Pesaka') telah memohon untuk dan memperoleh kelulusan untuk mengeluarkan bon-bon Al-Bai Bithaman Ajil ('bon-bon

tersebut') untuk membiayai pelaksanaan tiga kontrak kerajaan yang telah diawardkan kepadanya. Jaminan untuk bon-bon tersebut adalah penyerahhakkan Pesaka untuk semua hasil daripada kontrak-kontrak kerajaan ('hasil tersebut') kepada Mayban Trustees Bhd ('MTB'), sebagai pemegang amanah. MTB telah dilantik sebagai pemegang amanah untuk memegang hasil tersebut untuk pemegang bon, iaitu hasil tersebut diklasifikasikan. Walau bagaimanapun, Pesaka telah menyerahhak semua hasil tersebut yang akan diperoleh daripada kontrak-kontrak kerajaan kepada pemberi-pemberi pinjaman komersialnya, yang mana termasuklah antaranya CIMB Bhd ('CIMB'). Bagi tujuan menyerahhak hasil tersebut kepada pemegang-pemegang bon, Pesaka sebagai pengeluar bon perlu menebus penyerahhakkan daripada pemberi-pemberi pinjaman komersialnya. Bagi tujuan berikut, KAF Discounts Bhd ('KAF') telah campur tangan sebagai ketua pengurusan bon dan ejen keluaran untuk Pesaka. Sebagai ketua pengurusan bon KAF diberi amanah untuk memastikan bahawa pengkelasan berlaku sebelum keluaran bon-bon tersebut. Walau bagaimanapun, apabila bon-bon tersebut dikeluarkan berlaku kegagalan sepenuhnya terhadap pengkelasan. Meskipun begitu, KAF membayar keseluruhan wang yang diterima daripada bon-bon tersebut kepada Pesaka dan hasil tersebut yang disalurkan ke dalam akaun-akauan Pesaka dengan CIMB. Oleh itu, MTB tiada kawalan ke atas hasil tersebut selepas keluaran bon-bon tersebut. Pesaka seterusnya secara *fraud* telah mengeluarkan semua hasil tersebut dalam CIMB, meskipun hasil tersebut telah diserahhak dan bukan lagi hartanya. Akibat daripada itu tiada apa yang tinggal untuk penebusan bon-bon tersebut dan pemegang-pemegang bon tidak mendapat bayaran. Pemegang-pemegang bon kemudian telah memulakan tindakan terhadap Pesaka, KAF, MTB dan pemegang-pemegang saham majoriti Pesaka telah diselesaikan melalui penghakiman persetujuan. Pemegang-pemegang bon dengan itu memulakan tindakan mereka terhadap KAF dan MTB. Selepas itu, KAF dan MTB telah memfailkan tuntutan indemniti daripada Pesaka dan pemegang-pemegang saham majoriti Pesaka. Pada masa sama MTB juga telah memfailkan tuntutan terhadap CIMB kerana kecuaian dan pelanggaran amanah. Hakim perbicaraan telah mengawardkan penghakiman kepada pemegang-pemegang bon dalam jumlah yang dituntut terhadap KAF dan MTB dengan anggaran 60% dan 40%; menolak tuntutan-tuntutan yang dibuat oleh KAF dan MTB terhadap Pesaka dan pemegang-pemegang saham majoriti Pesaka; dan menolak tuntutan MTB terhadap CIMB. KAF dan MTB merayu terhadap penghakiman-penghakiman tersebut dengan mendakwa bahawa hakim perbicaraan terkhilaf dalam membuktikan Pesaka tidak bersalah sepenuhnya. MTB juga merayu terhadap penolakan tuntutannya untuk ganti rugi daripada CIMB, manakala pemegang-pemegang bon membuat rayuan balas terhadap keengganan hakim perbicaraan untuk memberi mereka faedah-faedah pra penghakiman. Penghakiman ini adalah berkaitan empat rayuan tersebut dan satu rayuan balas.

Diputuskan, membenarkan rayuan-rayuan KAF dan MTB terhadap Pesaka dan pemegang-pemegang majoriti Pesaka, rayuan MTB terhadap CIMB dan rayuan balas pemegang-pemegang bon dengan caj-caj penalti dan kos:

(1) Hakim perbicaraan tidak terkhilaf dalam penemuannya bahawa MTB tidak boleh mengelak daripada bersalah kerana kerugian tersebut. MTB tidak mengambil langkah-langkah tegas untuk mengawal akaun-akaun Pesaka sebelum keluaran bon-bon tersebut dan menunjukkan sikap tidak endah di pihaknya. Ini suatu yang serius di mana MTB patut dipertanggungjawabkan. Bahkan, MTB juga telah gagal dalam kewajipan statutorinya. Tambahan pula, KAF, ketua penasihat bon, telah gagal menyedari bahawa ia tidak boleh mengeluarkan bon-bon tersebut tanpa kawalan MTB. KAF atau MTB boleh menangani keadaan tersebut tetapi kedua-duanya gagal melaksanakan kewajipan statutori dan kontraktual mereka dan oleh itu kedua-duanya sama-sama bertanggungjawab. Oleh itu rayuan-rayuan oleh KAF dan MTB terhadap pemegang-pemegang bon ditolak dengan kos (lihat perenggan 25 & 29).

(2) Pemegang-pemegang bon yang dinafikan penggunaan wang mereka dari tarikh apabila kegagalan itu diisytiharkan sehingga tarikh penghakiman itu telah mengalami kerugian sebenar yang patut diberi pampasan. Oleh itu, KAF dan MTB telah diperintahkan untuk membayar kepada pemegang-pemegang bon caj-caj penalti pada kadar 3% ke atas jumlah penghakiman dari tarikh apabila kegagalan itu diisytiharkan sehingga tarikh penghakiman dan jumlah rayuan balas (lihat perenggan 39).

(3) KAF dan MTB menuntut indemniti penuh daripada Pesaka berdasarkan fasal pengecualian dalam perjanjian langganan dan kemudahan ('perjanjian tersebut') yang telah disempurnakan oleh pihak-pihak tetapi hakim perbicaraan mendapati bahawa kecuaian KAF dan MTB tidak memberi hak kepada mereka apa-apa indemniti daripada Pesaka. Mahkamah ini memutuskan bahawa terdapat kegagalan sepenuhnya oleh hakim perbicaraan untuk menyiasat jika fasal-fasal pengecualian tersebut terpakai pada mulanya. KAF dan MTB tidak mungkin berniat untuk fasal-fasal pengecualian itu akan terpakai jika berlaku *fraud* oleh Pesaka terlibat untuk mengubah keadaan di mana biasanya fasal-fasal pengecualian akan terpakai. Jika itu diniatkan maka ia patut dinyatakan dalam terma yang jelas dan nyata dalam perjanjian tersebut. Walau bagaimanapun, berdasarkan pelaksanaan sebenar fasal pengecualian adalah didapati bahawa fasal-fasal tersebut tidak meliputi *fraud* oleh Pesaka (lihat perenggan 41–42 & 55).

(4) Selanjutnya KAF dan MTB telah menanggung liabiliti dan kerugian semata-mata kerana tindakan sengaja Pesaka. Dalam keadaan kes ini penghakiman persetujuan bukan suatu pembelaan atau pengganti untuk fakta yang Pesaka tidak patut mengusik hasil tersebut. Dalam analisis

terakhir, kerugian tersebut adalah disebabkan oleh tindakan sengaja Pesaka dan hakim perbicaraan tidak patut melepaskan Pesaka sepenuhnya. Oleh itu KAF dan MTB patut bersama menanggung satu pertiga daripada kerugian keseluruhan RM149,300,000 berserta semua caj-caj penalti, manakala Pesaka patut membayar KAF dan MTB jumlah satu pertiga daripada kerugian ini berserta caj-caj penalti dan kos (lihat perenggan 62–63).

(5) Pemegang-pemegang saham majoriti Pesaka adalah orang-orang yang bertanggungjawab mengawal Pesaka dan semua keputusan penting dibuat oleh Dato' Mohd Rafie bin Sain ('Rafie'), sebagai prinsipal yang mempunyai kawalan mutlak ke atas Pesaka pada setiap masa matan. Oleh itu terdapat justifikasi untuk membuka pelindungan korporat bagi menentukan pemilikan sebenar aset-aset dalam Pesaka, dan meletakkan Rafie sebagai yang bertanggungjawab untuk tindakan Pesaka. Keadilan menuntut Rafie dan pemegang-pemegang saham majoriti lain Pesaka diperintahkan memberi indemniti kepada MTB dengan membayar dua pertiga daripada RM149,300,000 berserta semua caj-caj penalti dan kos (lihat perenggan 69–71).

(6) Dalam rayuan MTB terhadap CIMB, adalah didapati bahawa hakim perbicaraan telah gagal menyedari bahawa hubungan antara Pesaka dan CIMB bukan sebagai bank dan pelanggan biasa. Juga tidak disedari bahawa CIMB tidak patut dipedulikan kepentingan pemegang-pemegang bon apabila ia mempunyai pengetahuan bahawa hasil tersebut bukan milik Pesaka. CIMB mengetahui bahawa hasil tersebut dalam akaun-akaun milik pemegang-pemegang bon dan dengan itu adalah pemegang amanah konstruktif hasil tersebut. Sebagai pemegang amanah konstruktif ia tidak patut membenarkan Pesaka memindahkan hasil tersebut keluar daripada akaun-akaun yang ditetapkan. Dengan membenarkan pemindahakkan itu CIMB membenarkan pelanggaran amanah dan pelanggaran kewajipannya sebagai pemegang amanah konstruktif terhadap hasil tersebut. Oleh itu, CIMB patut mengindemnitikan MTB setakat satu pertiga daripada keseluruhan liabiliti yang ditanggung oleh MTB (lihat perenggan 84–85).]

Editorial Notes:

This case supersedes the previous publication of the same in [2012] 2 MLJ 187.

Notes

For cases on banker and customer in general, see 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2085–2184.

Cases referred to

Anderson v Fitzgerald (1853) 4 HLC 484; (1853) 10 ER 551, HL (refd)
Antaios Compania Naviera SA v Salen Rederierna AB [1985] AC 191, HL (refd)

Aspatra Sdn Bhd & 21 Ors v Bank Bumiputra Malaysia Bhd & Anor [1988] 1 MLJ 97, SC (refd)
Darby ex parte Brougham, Re [1911] 1 KB 95 (refd)
Dering v Earl of Winchelsea [1775–1802] All ER Rep 140 (refd)
Gilford Motor Co v Home [1933] Ch 935, CA (refd)
Guardian Assurance Co Ltd v Condogianis (1919) 26 CLR 231 (refd)
HIH Casualty and General Insurance Ltd and others v Chase Manhattan Bank and others [2003] 2 Lloyd's Rep 61, HL (refd)
Hong Realty (Pte) Ltd v Chua Keng Mong [1994] 3 SLR 819, CA (refd)
Hotel Anika Sdn Bhd v Majlis Daerah Kluang Utara [2007] 1 MLJ 248, HC (refd)
HSBC Bank Malaysia Bhd v Dharani Sugars & Chemical Ltd and another appeal [2011] 1 MLJ 52, FC (refd)
Hussey v Palmer [1972] 3 All ER 744, CA (refd)
Isito Electronics Sdn Bhd v Teh Ah Kiam & Anor [2004] 7 MLJ 513, HC (refd)
Jones and another v Lipman and another [1962] 1 All ER 442 (refd)
Karsales (Harrow) Ltd v Wallis [1956] 1 WLR 936, CA (refd)
Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd (Bhagat Singh s/o Surian Singh & Ors, Interveners) [1996] 2 MLJ 431, HC (refd)
Maslinda bt Ishak v Mohd Tahir bin Osman & Ors [2009] 6 MLJ 826, CA (refd)
Nayar Modern Bank Ltd v Official Liquidators of the Travancore National and Quilon Bank, Ltd (1940) 2 MLJ 559; (Mad); AIR 1940 Mad 149, HC (refd)
Photo Production Ltd v Securicor Transport Ltd [1980] AC 827, HL (refd)
Ramlah bte Abdullah v Talasco Insurance Sdn Bhd & Anor [2009] 3 MLJ 474, CA (refd)
Robert Bosch (SEA) Pte Ltd v Goh Ban Huat Bhd [1996] 1 AMR 714, HC (refd)
Stevens v Stevens [2006] OJ No 2755, CA (refd)
Suisse Atlantique Societe d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale [1967] 1 AC 361, HL (refd)
Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor [1996] 3 MLJ 533, FC (refd)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 2) [2010] 2 MLJ 181, FC (refd)
Target Holdings Ltd v Redferns (a firm) and anor [1996] AC 421, HL (refd)
Tay Choo Foo @ Tay Chiew Foo v Tengku Mohd Saad @ Tengku Arifaad bin Tengku Mansur & Ors (all acting as administrators of the estate of Tunku Mansur bin Tunku Yaacob, deceased) and another appeal [2009] 1 MLJ 289, CA (refd)
Tinsley v Milligan [1993] 3 All ER 65, HL (refd)
Wallersteiner v Moir; Moir v Wallersteiner and others [1974] 3 All ER 217, CA (refd)
Wee Lian Construction Sdn Bhd v Ingersoll-Jati Malaysia Sdn Bhd [2005] 1 MLJ 162, HC (refd)

Legislation referred to

Banking and Financial Institutions Act 1989
Capital Markets and Services Act 2007 ss 55, 57, 58, 153
Central Bank of Malaysia Act 2009 s 56(1)(a)
Companies Act [IND] s 282-B(1)
Islamic Banking Act 1983
Securities Commission Act 2007

Robert Lazar (Gapal Sreenevasan and Lai Wai Fong with him) (Sreenevasan Young) for the appellant in W-02–2143 of 2010.
Robert Lazar (Gapal Sreenevasan and Lai Wai Fong with him) (Sreenevasan Young) for the appellant in W-02–2151 of 2010.
Robert Lazar (Gopal Sreenevasan and Lai Wai Fong with him) (Sreenevasan Young) for the appellant in W-02–2152 of 2010.
Cecil Abraham (Rishwant Singh, Mohamed Zaini Mazlan and Mawar Ahmad Fadzil with him) (Zaini Mazlan) for the appellant in W-02–2187 of 2010.
Tommy Thomas (Alan Gomez with him) (Tommy Thomas) for the respondent in W-02–2143 of 2010.
Tommy Thomas (Alan Gomez with him) (Tommy Thomas) for the first to tenth respondents in W-02–2151 of 2010.
M David Morais (Chang Mai, Shahabudin Shark Alaudin and Wan Muhammad Amin Wan Yahya with him) (Shahabudin & Rozima) for the 11th respondent in W-02–2151 of 2010.
M David Morais (Chang Mai, Shahabudin Shaik Alaudin and Wan Muhammad Amin Wan Yahya with him) (Shahabudin & Rozima) for the first respondent in W-02–2152 of 2010.
Wong Kian Kheong (Karen Lee Foong Voon and Geraldine Oh Kah Yan with him) (Wong Kian Kheong) for the second to eighth respondents in W-02–2152 of 2010.
Tommy Thomas (Alan Gomez with him) (Tommy Thomas) for the first to tenth respondents in W-02–2187 of 2010.
Robert Lazar (Gopal Sreenevasan and Lai Wai Fong with him) (Sreenevasan Young) for the 12th respondent in W-02–2187 of 2010.

Jeffrey Tan JCA:

[1] Pesaka Astana (M) Sdn Bhd ('Pesaka') issued but failed to redeem its 'Al-Bai' Bithaman Ajil' bonds ('bonds') as promised in the wake of that default, multifarious actions multifarious actions followed. The bondholders (original plaintiffs) filed suit against Pesaka (bond issuer) for payment, against KAF Discounts Bhd (bond lead arranger/facility agent and issue agent) for breach of contractual and statutory duties and negligence, against Mayban Trustee Bhd (bond trustee) for breach of trust and or contract and negligence, and against Dato Mohamad Rafie bin Sain and Datin Murnina bt Dato Hj Sujak (majority shareholders of Pesaka) and the Amdac Group of Companies (original sixth to

12th defendants) controlled by Rafie and Murnina, for indemnity and general damages (see pp 578–579 of the appeal record).

[2] The bondholders' action against Pesaka, Rafie, Murnina, and the Amdac Group was amicably settled; by a consent judgment entered on 7 July 2008 (8089AR), (i) Pesaka agreed to pay to the bondholders the sum of RM149,315,00 together with interest at the rate of 8%pa from 1 October 2005 to date of satisfaction, (ii) Rafie and the Amdac Group agreed to pay to the bondholders such general damages to be assessed together with interests thereon at the aforesaid rate and period, and, (iii) the bondholders withdrew their action against Murnina.

[3] Thereafter, the bondholders were left with just their action against KAF Discounts Bhd ('KAF') and Mayban Trustee Bhd ('MTB'). By then, KAF had filed a claim for indemnity from Pesaka, and MTB had filed a claim for indemnity from Pesaka, Rafie, Murnina, and the Amdac Group. That was not the end of it. MTB had also filed a claim against CIMB for negligence and breach of (constructive) trust. As between KAF and MTB, each had filed a claim for indemnity and or contribution from the other.

[4] On 30 June 2010, that is, after a trial that lasted 25 days, the learned judge (i) awarded judgment to the bondholders, in the sum claimed, against KAF and MTB in the proportion of 60%:40%, (ii) dismissed KAF's claim against Pesaka, (iii) dismissed MTB's; claim against Pesaka, Rafie, Murnina, and the Amdac Group, and, (iv) dismissed MTB's claim against GIMB, against which arose these four appeals and a singular cross-appeal.

[5] The bondholders' action, and KAF and MTB's claims, all had the following backdrop. Pesaka had three government contracts (for those contracts, see p 2562 of the appeal record) but was short of funds to finance the execution of those contracts and to repay its existing commercial lenders (2465AR). To raise those funds, Pesaka applied and obtained formal approval from the Securities Commission to issue bonds (primary and secondary) to the value of RM157,815. With formal approval in hand, Pesaka then issued, on 15 March 2004, an information memorandum (2454AR) to 'potential' bondholders. Basically, that IM informed that the security for the bonds would be Pesaka's assignment (2469–2470AR) of all revenue from those contracts (revenue) to a trustee, who would be MTB. That IM also informed that all revenue would be deposited into designated banking accounts controlled by MTB (2467AR) who would apply the revenue deposited into those designated banking accounts to redeem the bonds (2468–2469AR). That would be the devise, euphemististically called 'ring fencing', to put all revenue beyond Pesaka and so ensure that the bonds would be redeemed, so the IM in effect informed.

[6] A day after the issuance of the IM, Pesaka executed the required security documents (for those documents, see 2470AR and 2471AR). Inter alia, by trust deed dated 19 March 2004 (2568–2659AR), MTB was appointed the trustee to hold the revenue for bondholders. By assignment and charge dated 19 March 2004 (2827AR), Pesaka assigned all revenue that would be deposited into designated banking accounts in favour of MTB who in turn agreed to hold all such revenue as trustee for the bondholders (2836AR) (all security documents, although dated 19 March 2004, were in fact executed on 16 March 2004).

[7] As said, Pesaka had existing commercial lenders. By BPIMB facility agreements 1 & 2 respectively dated 4 December 2001 and 14 April 2003, Pesaka had assigned all revenue from the first and second government contracts to Bank Pembangunan dan Infrastruktur Malaysia Bhd. And by facility agreement dated 24 April 2003, Pesaka had assigned all revenue from the third government contract to the CIMB Cosway Branch, Kuala Lumpur. In order to assign the revenue to bondholders, Pesaka had to redeem the same from BPIMB and CIMB, Accordingly, on the day of execution of the aforesaid security documents, Pesaka together with KAF entered into release and assignment agreements with BPIMB and the CIMB Cosway branch (see 2734AR for that release agreement with BPIMB, and 2752AR for that release agreement with the CIMB Cosway branch).

[8] With Pesaka as issuer and KAF as 'lead arranger', as 'facility agent' and as 'issue agent', the subscription and facility agreement ('SF agreement') then secured K & N Kenaga Bhd as the primary subscriber of the bonds.

[9] A primary subscriber in hand is one thing, but the issuance of bonds is another matter altogether. Various conditions precedent had to be fulfilled before bonds could be issued. Sub-clauses 3.1 and 3.2 of the SF agreement (2683AR) read as follow:

> 3.1 Conditions Precedent
>
> The obligation of the issuer to issue the ABBA Bonds and the agreement of the Primary Subscriber to accept and receive the ABBA Bonds under this Agreement shall be expressly subject to this condition that the Lead Arranger has received the documents and or evidence listed in Schedule A in each case in form and content satisfactory to the Lead Arranger and Primary Subscriber.
>
> 3.2 Waiver of Conditions Precedent
>
> The terms and conditions set out in Schedule A herein are expressly; inserted for the sole benefit of the Primary Subscriber and may be waived by the Primary Subscriber in whole or in part with or without terms of conditions.

[10] The pertinent condition precedent in the said Schedule A (2729AR) read as follows:

> 11. Confirmation by the Issuer to the Lead Arranger that it has opened the Designated Accounts and the mandates (in form and content suitable to the Lead Arranger) in respect of the designated Accounts.

[11] While the aforesaid cl 3.1 provided that the 'obligation of the issuer to issue the ABBA Bonds and the agreement of the Primary Subscriber to accept and receive the ABBA Bonds under this Agreement shall be expressly subject' to the aforesaid condition precedent 11 ('CP11'), cll 4.1 and 4.2 of the SF agreement (see 2683–2684AR) provided that the issuance of bonds shall be subject to the condition that CP11 had been fulfilled to the satisfaction of the lead arranger and the primary subscriber.

[12] The issuance of bonds was further subject to the condition (see cl 4.3 of the SF agreement at 2684AR) that 'No event of default had occurred and/or is continuing'. The SF agreement defined 'Event of default' as 'any of the events referred to in [CP11]' (see 2673AR).

[13] All those conditions had to be fulfilled before Pesaka could issue to the primary subscriber, through the lead arranger, the primary and secondary bonds (see 2684AR).

[14] Together, cl 3.1 and CP11 required of KAF to have received Pesaka's confirmation that Pesaka had opened the designated accounts and the mandates (in form and content suitable to the lead arranger) in respect of the designated accounts. And together, cll 4.1, 4.2, 4.3 and CP11 required of KAF to be satisfied that there was no default of CP11. In order to be so satisfied, KAF as lead arranger, facility agent and issue agent, had to independently verify that all were in place. In the scheme of things in relation to bonds, there is no place for trust simpliciter. All acts and deeds must be in place before the issuance of bonds. 'His word is not his bond'. Confirmation by Pesaka was no proof that the required designated accounts with the mandates had actually been opened. For that reason, it was provided that there must be designated accounts with MTB in sole control. KAF, as principal financial advisor, lead arranger, facility agent and issuing agent and indeed as the party who submitted the IM (2923AR and 3179AR) and as the issue advisor (2925AR), ought to know that. Bonds could not be issued without the security being in place. KAF had to be absolutely sure that the required designated accounts with MTB in sole control were in place before the issuance of bonds. The stable door must be first closed. The accounts into which revenue would be deposited must be in operation and

in the sole control of MTB before bonds could be issued. Only such accounts could be designated accounts. But even so, those accounts must be Shariah compliant.

[15] The deed of assignment and charge provided (2828AR) that the designated account shall be 'Shariah compliant'. The trust deed dated 16 March 2004 (2568AR) and the SF agreement (2663AR) were more specific. Both defined designated accounts as 'Syariah compliant, non-interest bearing accounts' (2578A and 2672AR). The IM might be silent as to whether the designated account must be Shariah compliant. But given the definition of it in the deed of assignment and charge, trust deed, and SF agreement, conventional banking accounts could not be those designated accounts. Quite inconsistently, the assignment and charge (2829AR) specified that Pesaka's conventional accounts at the CIMB Cosway and Subang branches would be the designated accounts. But the SF agreement stipulated that the designated accounts must be Shariah compliant. There was no waiver of that condition. And the condition on Syariah compliant remained so, despite whatever had been proposed and or had been accepted by KAF or due diligence working group as the so called designated accounts.

[16] Mere designation of accounts would not convert those accounts to the required designated accounts. Consequently, all those notices from Pesaka (3693AR, 4073AR and 4075AR), the due diligence working group or KAF, to the effect that Pesaka's existing conventional accounts at the CIMB Cosway and Subang branches were the designated accounts were totally ineffectual to have opened the required designated accounts. Likewise, Pesaka's resolution (4000AR) to the effect that MTD's nominees were the signatories to Pesaka's aforesaid conventional accounts had not brought about the required designated accounts with MTB in sole control.

[17] It was glaringly evident that there were no designated accounts as required. There were never any Shariah compliant accounts or even conventional accounts for that matter into which the revenue would be or was being deposited, with MTB in sole control. Put simply, the required designated accounts were never there. 'Ring fencing' was also not there on 1 April 2004. Prudence alone should have dictated that the bonds could not be issued. If issued without 'ring fencing', it would mean that the primary subscriber would pay for bonds without the security to back it. Moreover, in that circumstance, cl 4.3 of the SF agreement mandated that bonds could not be issued. But bonds were issued nonetheless by KAF on 1 April 2004. Funds received from those bonds were also entirely disbursed with alacrity by KAF on 1 April 2004 (4136AR) (After BPIMB and CIMB were repaid on 1 April 2004, Pesaka's assignment of the revenue from the contracts was then perfected by assignment dated 1 April 2004 at p 2866–2884AR).

[18] 'Ring fencing' was not even there after the bonds had been issued and after the bonds proceeds had been fully disbursed. In the meantime, revenue flowed into Pesaka's conventional account at the CIMB Cosway branch. Pesaka had a number of conventional accounts, but the revenue was only deposited into the revenue/proceeds account at the CIMB Cosway branch, That revenue belonged to bondholders. Still 'ring fencing' was not in place, not even after all revenue had been deposited into Pesaka's aforesaid account. That revenue in that aforesaid conventional account was not controlled by MTB. As a matter of sad fact, MTB had no control whatsoever of all revenue deposited into the aforesaid conventional account after the issuance of the bonds. When revenue was deposited into the aforesaid conventional account, Pesaka controlled it. The signatory or signatories to all conventional accounts were yet the nominee/s of Pesaka. In that state, it should have dawned upon KAF and or MTB that the security of the bondholders had been totally breached. Pesaka could withdraw the revenue at will, notwithstanding that the revenue had been assigned and was no longer its property. And sad to say, so it proved to be that Pesaka could indeed withdraw all revenue. Between July 2004 and September 2005, Pesaka fraudulently withdrew all revenue that had been deposited into its conventional account at the CIMB Cosway branch. On Pesaka's instructions, all revenue in that conventional account was transferred to other accounts. Pesaka had made off with the revenue, despite Pesaka's prior notices to the GIMB Cosway and Subang branches that Pesaka had assigned and charged all rights and title in and to all said conventional accounts to MTB (see 3727 and 3729AR). Not surprisingly, there was nothing left in the till for the redemption of bonds. Bondholders were left high and dry, and quite without payment.

[19] Overnight (MTB declared default on 30 September 2005), the bonds became worthless pieces of paper (actually scrip less). But that should not have happened, as the revenue was supposed to have been 'ring fenced'. The IM informed that all revenue would be deposited into designated banking accounts. The IM informed that MTB would have absolute control of those designated banking accounts (2467AR). In effect, the IM informed that Pesaka would have no control whatsoever of the revenue. MTB was supposed to control and apply the revenue to redeem the bonds. 'Ring fencing' was the *piece de resistance* in the redemption structure to ensure that the bonds would be redeemed as promised. But yet there was a total failure to have 'ring fencing' in place, both before and after the issuance of bonds on 1 April 2004, both before and after the revenue had been deposited into the banking accounts of Pesaka, and even as Pesaka was making away, that is, from July 2004–September 2005, with the revenue.

[20] Fraudulent misappropriation of trust property was the immediate cause of the loss of the revenue. But it was the dereliction of duty and or negligence

that allowed that to happen. The stable door was invitingly not shut. Those who had the duty to shut that door would have to restore the total loss. That such is the extent of that liability was reaffirmed in *Target Holdings Ltd v Redferns (a firm) and anor* [1996] AC 421, where Lord Browne-Wilkinson, speaking for the House for the House of Lords, said:

> The basic right of a beneficiary is to have the trust duly administered in accordance with the provisions of the trust instrument, if any, and the general law. Thus, in relation to a traditional trust where the fund is held in trust for a number of beneficiaries haying different, usually successive, equitable interests, (eg A for life with remainder to B), the right of each beneficiary is to have the whole fund vested in the trustees so as to be available to satisfy his equitable interest when, and if, it falls into possession. Accordingly, in the case of a breach of such a trust involving the wrongful paying away of trust assets, the liability of the trustee is to restore to the trust fund, often called 'the trust estate', what ought to have been there.
>
> The equitable rules of compensation for breach of trust have been largely developed in relation to such traditional trusts, where the only way in which all the beneficiaries' rights can be protected is to restore to the trust fund what ought to be there. In such a case the basic rule is that a trustee in breach of trust must restore or pay to the trust estate either the assets which have been lost to the estate by reason of the breach or compensation for such loss. Courts of Equity did not award damages but, acting in personam, *ordered the defaulting trustee to restore the trust estate* (see *Nocton v Lord Ashburton* [1914] AC 932 [1914] at pp 952, 958, [1914–1915] All ER Rep 45 at pp 51, 55, per Viscount Haldane LC). *If specific restitution of the trust property is not possible, then the liability of the trustee is to pay sufficient compensation to the trust estate to put it back to what it would have been had the breach not been committed* (see *Caffrey v Darby* (1801) 6 Ves 488; [1775–1802] All ER 507 and *Clough v Bond* (1838) 3 My & Cr 490, 40 ER 1016). *Even if the immediate cause of the loss is the dishonesty or failure of a third party, the trustee is liable to make good that loss to the trust estate if, but for the breach, such loss would not have occurred* (see *Underhill and Hayton Law of Trusts and Trustees* (14th Ed), 1987, at pp 734–736, *Re Dawson (deed), Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211 and *Bartlett v Barclays Bank Trust Co Ltd (No 2)* [1980] 2 All ER 92; 1980 Ch 515). Thus the common law rules of remoteness of damage and causation do not apply. However, there does have to be some causal connection between the breach of trust and the loss to the trust estate for which compensation is recoverable, viz the fact that the loss would not have occurred but for the breach (see also *Re Miller's Deed Trusts* [1978] LS Gaz R 454 and *Nestle v National Westminster Bank plc* [1994] 1 All ER 118; [1993] 1 WLR 1260).

[21] The bondholders contended that KAF and MTD were negligent in their duties. On that, the learned judge held to the effect (i) that KAF had the duty to verify all information in the IM, but that the inclusion of the foreign exchange loss claim to the total revenue from third contract was not false or misleading (see 49AR), (ii) that new accounts must be opened but that existing accounts could be the designated accounts if 'ring fencing' were in place with MTB in control, and if that information were released to the market, and that

when existing accounts were intended to be used, there was that duty on the part of KAF to inform bondholders (see 50AR), (iii) that KAF had the duty to ensure that all parties played their part according to the IM, and, (iv) that the conduct of KAF, in leaving it to MTB to take control of the 'designated' accounts, was below the expected standard of professional lead arrangers/facility agents. On that duty of KAF as lead arranger/facility agent, the learned judge held that KAF had to ensure that CP11 'was fulfilled in real terms and not only in [executory] stage only' (see 51AR), that KAF had the overall supervisory role which would not be lessened by the engagement of other professionals (see 52AR), and that the absence of 'ring fencing' was a breach by KAF (see 52AR). The learned judge found that bond default was due to the failure to 'ring fence' the 'designated accounts on 1.4.2004, and that that failure allowed for the unauthorised withdrawals (see 53AR). The learned judge concluded, 'in the circumstances, I find the claim of the [bondholders] against KAF proved on a balance of probabilities …'.

[22] As for the case against MTB, the learned judge held to the effect (i) that it was the duty of MTB to see that it had the sole control of the designated accounts, (ii) that that duty of MTB commenced well before the issuance of bonds on 1 April 2004, (iii) that MTB being in control of the accounts must be resolved when bonds were issued and bond proceeds were disbursed (53–54AR), (iv) that the responsibility of MTB as trustee started upon appointment in July 2003 and not only when accounts were opened and monies were deposited (54AR), (v) that MTB had not exhibited the level of professionalism, competence, skill expected of professional trustees (54AR), (vi) that the role of MTB was as trustee and not mere signatory (55AR), (vii) that the IM and trust deed required MTB to manage the designated accounts and to authorise the movement of its funds (55AR), (viii) that it was open to MTB to remind all parties of the terms of the IM and trust deed and the implication of any departure (55AR), (ix) that MTB owed a duty, under contract, tort, and trust (56AR), (x) that MTB ought to have taken steps to address the fact that it was not the signatory to the designated accounts (56AR), (xi) that MTB ought to have been alerted that something was amiss when funds were moved out of the designated accounts (56AR), (xii) that MTB was amateurish, indifferent, and lacked urgency in the execution of its obligations (56AR), and (xiii) that MTB did nothing to ensure that its primary role was not compromised (57AR).

[23] The learned judge rejected altogether the argument that MTB could not have done anything to prevent those withdrawals from those conventional accounts, that is, once KAF accepted that CP11 had been satisfied, even when MTB was not in control of the accounts (57AR). Suffice it to say that the

learned judge took a dim view of the total conduct of MTB. The learned judge concluded, only that time against MTB (58AR), that the bondholders' claim had been made out.

[24] Before us, much effort was invested by learned counsel for KAF (Tan Sri Cecil Abraham) and learned counsel for MTB (Mr Robert Lazar) to put their respective appeals in the best light. But no matter how much both learned counsel tried, there was still no getting away from the fact that there were no designated accounts or any 'ring fencing' in place when the bonds were issued. And in the presence of that stubborn fact, there could be no getting away from it that KAF had not ascertained that CP11 had been complied. For if CP11 were complied, there would have been those designated accounts with MTB in sole control. The fact that there were no such designated accounts meant that CP11 had not been complied. An 'event of default' had occurred. The event of default had not been put right on 1 April 2004. One of the conditions for the issuance of the bonds was that no 'event of default' had occurred. Clause 4.3 of the SF agreement provided that the issuance of bonds was subject to the condition that an 'event of default' had not occurred. Yet KAF issued those bonds on 1 April 2004, even in the face of an 'event of default'. There could not be no question about it. KAF had clearly breached the IM and the SF agreement. KAF had issued the bonds without the promised security being in place. And that was the next proximate cause for the loss. Absence of 'ring fencing' was yet not the next proximate cause for the loss. Those false and or misleading statements in the IM (which would be further related in the course of this judgment) had yet not caused the loss. After fraudulent misappropriation, the next proximate cause for the loss was the issuance of the bonds on 1 April 2004. Had KAF not issued those bonds on 1 April 2004, there would not have been the loss, even if 'ring fencing' were not in place. Had KAF insisted on compliance with CP11, there would have not been the issuance of bonds and so there would not have been any loss. But once those bonds were issued on 1 April 2004 without MTB in sole control, KAF lost whatever hold it had on Pesaka. For so long as the bonds were not issued, KAF could 'lean on' Pesaka to comply with the IM and other security documents or to have the issuance of bonds withheld. But once those bonds were issued on 1 April 2004, Pesaka need not be earnest on the matter of its compliance with the IM and other security documents. It could be surmised that in so far as Pesaka was concerned, the loan had been obtained and the security to bondholders could be put on the back burner. The evidence was that after the issuance of the bonds, all attempts by MTB, albeit belated, to be the sole signatory of those conventional accounts at the CIMB Cosway branch met with no success. Now, had those attempts by MTB been made before the issuance of the bonds, would it have been likely that MTB would not have been put in sole control of those conventional accounts at the CIMB Cosway and Subang branches? It would not seem that that would have been so. If MTB were not put in sole control, KAF could easily withhold the issuance of bonds. The best opportunity to put

MTB in sole control was before the issuance of bonds. But that opportunity was lost when KAF issued those bonds without MTB being in control. And when that was lost, MTB had a much tougher task to get on board. It was KAF's issuance of the bonds in breach of cll 3.1 and 4.3 of the SF agreement read together with CP11 that threw any implementation of 'ring fencing' out of sync in the first place. KAF unleashed Pesaka. That was the magnitude of the act of KAF. Thereafter, MTB had to rein in Pesaka. Who should bear the greater blame, KAF who unleashed Pesaka or MTB who failed to rein in Pesaka?

[25] The learned judge held that MTB could not escape blame for the loss. And on that, it would not appear that the learned judge had erred at all. MTB was informed on 29 March 2004 (see 8424(21)) of the intended date for the issuance of the bonds. The assignment and charge, to which MTB was party, specified that Pesaka's conventional accounts would be the designated accounts. By the trust deed, MTB agreed to take sole control of all designated accounts. Now since MTB had agreed to Pesaka's conventional accounts to be the designated accounts (as said, the assignment and charge conflictingly specified that Pesaka's conventional accounts at the CIMB Cosway and Subang branches would be the designated accounts), then MTB must take control of those conventional accounts. Perhaps, on 16 March 2004, control of those conventional accounts could yet wait. But control of those conventional accounts became a matter of the utmost urgency upon notification that bonds would soon be issued. But yet in the face of notification that bonds would be issued soon (on 26 March 2004, then put off to 1 April 2004), MTB took no assertive steps to control those conventional accounts before the issuance of the bonds. There was a total lack of urgency on the part of MTB to control those conventional accounts, despite the impending issuance of bonds. For instance, MTB only returned the specimen scanner form and specimen cards on 9 April 2004 (4147AR). Like KAF, MTB totally failed to appreciate that control of those conventional accounts, if those conventional accounts were to be the designated accounts, was an absolute must before the issuance of bonds. All security document stated so. Had MTB appreciated so, then MTB would have taken such step to take control, and then if not successful, so informed KAF before the issuance of the bonds. If that had been done, then MTB would have discharged its duty and should be totally off the hook, regardless of what KAF would do, to issue or not to issue those bonds on 1 April 2004. But MTB saw no such urgency to take control or so informed KAF that it (MTB) was not in control. That was serious lapse, for which MTB must be held to account.

[26] As luck would have it, it also escaped KEF that it could not issue the bonds without MTB being in control. And so both professionals — lead arranger/facility agent/issue agent/principal financial advisor, and trustee — fatally marched on towards the issuance of bonds, without a care in the world,

or so it should seem, for what had to be done and to be satisfied before both could allow the issuance of the bonds. As said, the bonds were issued on 1 April 2004 without the promised security in place. In doing so, first KAF and then MTB had let the bondholders down.

[27] After the issuance of the bonds, MTB could yet have saved the day. Revenue (or rather, whatever balance) had yet to be deposited into Pesaka's conventional accounts. MTB could yet take control of those accounts, before revenue was deposited and before anything could be removed. Had that been done, there would not have been those transfers from those accounts, and the revenue would yet be preserved. It was still not too late to do what should have been done in the first place. Except that MTB must act with expedition. But again, MTB was found wanting. MTB showed no urgency whatsoever to take control, even when MTB ought to know that those accounts into which revenue would be deposited were not in its control, and even when it knew that Pesaka had withdrawn revenue from accounts that it was supposed to control. MTB took no assertive action to stop Pesaka from operating those accounts that it was supposed to control. MTB should have attempted to do so, if not by any other means than by the power of attorney to seize control. And if all attempts to take control should prove unsuccessful, MTB could call for a bondholders meeting under s 82(e) (deleted in 2007 by Act 1305) of the Securities Commission Act 1993 and place before the meeting such proposals for the protection of the bondholders. MTB had no control of the accounts, which meant that the revenue was unavailable to MTB to repay the bonds. Being unavailable, there were consequently insufficient funds to repay the bonds. Hence, MTB could even apply to court for an order under s 91 read together with s 82(1) (both sections deleted by Act 1305) of the SC Act 1993. The transfers from the accounts occurred between July 2004 and September 2005. The loss could have been mitigated, if only something had been done. But MTB permitted things to slide. MTB permitted Pesaka to control and to operate those accounts, when it was totally imprudent and unwise to do so. To say the least, it was folly of the first order. Most evidently, just as the learned judge had found, 'MTB had not exhibited the level of professionalism, competence, skill expected of professional trustees'.

[28] MTB had also failed in its statutory duties. Section 82(1)(c) (deleted by Act 1305) of the SC Act 1993 provided that MTB as the trustee 'shall exercise reasonable diligence to ascertain whether [Pesaka]… has committed any breach of the terms, provisions or covenants of … trust deed'. By not putting MTB in control, Pesaka had committed a breach of the trust deed. MTB should have called for a meeting of the bondholders. If done early, that would have stopped Pesaka's shenanigans with the revenue. Suffice it to say that MTB could have made it difficult if not impossible for Pesaka to have fraudulently

withdrawn that RM107m from its account at the CIMB Cosway branch, for that period between August 2004 and September 2005.

[29] Default should be weighed and not counted. Had KAF been vigilant, there would also have not been those fraudulent withdrawals. Either KAF or MTB could have arrested the situation. Both failed to carry out their statutory and contractual duties. Hence, we unanimously hold both equally liable. In the result, we unanimously allow KAF's appeal against MTB to that extent, and unanimously dismiss MTB's appeal against KAF, with costs in both latter appeals to KAF.

[30] The actual loss occasioned by the absence of 'ring fencing' was RM107m, which was the total revenue that was deposited into Pesaka's conventional accounts at the CIMB Cosway branch. It was argued that any assessment of MTB's liability should be based on that RM107m. Common law provided that bondholders would be indemnified for their total loss, which was the total face value of the bonds. Written law was not any different. Section 57 (deleted by Act 1305) of the SC Act 1993 provided that 'a person who acquires, subscribes for or purchases securities and suffers loss or damage as a result of any statement: or information contained in a prospectus (the definition of which included the IM) that is false or misleading, or any statement or information contained in a prospectus from which there is a material omission, may recover that amount of loss or damage from' 'the issuer … a principal advisor …'. As said, there were false and or misleading statements in the IM. The IM stated the contact sum was RM150,613,200, but failed to disclose that the revenue that would be received would be substantially less than the contract sum, as the contracts had already been partly paid at the time of issuance of the IM. The IM also imparted that a foreign exchange loss claim for RM31,529,338 had been approved. The note at the bottom of 2562AR which read 'Bomba vide [3118AR] has agreed to compensate [Pesaka] on losses I arising out of foreign exchange differences, on its contracts with [Pesaka] (i.e. contracts number (ii) and (iii) in the table above)' was entirely economical with the true. The truth was that the Fire and Rescue Department merely acknowledged a foreign exchange loss claim for an unspecified amount (see 3118AR). Those statements on the revenue at 2562AR could not have been true, as the total revenue actually deposited after the issuance of bonds, which was the acid test on the truth of the statements in 2562AR, was only RM107m and not RM180m. That clearly evinced that the statements at 2562AR were false and misleading. Had 'ring fencing' been in place, MTB would only have had RM107m to redeem the bonds, and the shortfall would have to be covered by Pesaka, KAF and MTB. Clearly therefore, the fact that only RM107m was lost would not assuage the liability of KAF or of MTB.

[31] In fact, the IM had not only toyed with the truth, but had been

amended without approval. On 14 April 2004 (3503AR), KAF submitted an amended application to the Securities Commission for its approval for the issuance of the bonds. The amended application stated (3529AR) that the said foreign exchange loss claim was for the sum of RM12,4213,468. On 28 January 2004 (3584AR), the Securities Commission gave its approval for the issuance of the said bonds, but subject to the terms and conditions as stated in KAF's said amended application dated 14 January 2004. That was the approval upon which the IM was issued. Paragraph 4(i) of the said approval read 'pihak [KAF] dan [Pesaka] hendaklah mendapatkan kelulusan kami terhadap sebarang pindaan ke atas terma-terma dan syarat-syarat terbitan bon ABBA' (3585AR). The Securities Commission had made it clear that the terms and conditions for the issuance of the bonds could not be amended without its approval. But yet the IM (2562AR) informed that the foreign exchange loss claim was for the sum of RM31,529,338. Evidently, there was no regard for the Securities Commission or for the truth.

[32] It was KAF (see for instance, 3503AR) and not MTB who submitted the proposal to the Securities Commission. And it was KAF who issued those false and misleading statements, and amended those statements at 2562AR without approval. KAF must answer to the bondholders for those false and or misleading statements. But KAF was not the only party who should answer. Pursuant to the provisions of s 82 (deleted by Act 1305) of the SC Act 1993, MTB had to exercise reasonably diligence to ascertain whether the revenue was insufficient or was likely to be insufficient to repay the amount payable on the bonds. In order to be so satisfied as to whether the revenue was insufficient or was likely to be insufficient to repay the amount payable on the bonds, MTB had to exercise reasonable diligence to ascertain the actual position of the available revenue. And MTB could not have done that. For it should have discovered, with some reasonable diligence, that the total receivable revenue was not RM182,142,538 (2562AR). Section 83(1)(a) (deleted by Act 1395) of the SC Act 1993 provided that MTB as trustee shall not be exempted for any breach or trust or for failure to show the degree of care and diligence. MTB had not shown the required degree of care and diligence, and so should also answer to the bondholders for those false and or misleading statements at 2562AR.

[33] It was argued that there was no agreement between KAF and the bondholders and that the disclaimer (see 2456AR) at the opening page of the IM exempted KAF from all liability. That disclaimer was in the following terms.

IMPORTANT NOTICE

THE SECURITIES COMMISSION HAS APPROVED THIS PROPOSAL PURSUANT TO SECTION 32 OF THE SECURITIES COMMISSION ACT 1993. PLEASE NOTE THAT THE APPROVAL SHALL NOT BE TAKEN TO INDICATE THAT THE SECURITIES COMMISSION RECOMMENDS THE PROPOSAL.

PESAKA ASTANA (M) SDN BHD (HEREINAFTER REFERRED TO AS 'PASB') HAS APPOINTED KAF DISCOUNTS BERHAD AS THE LEAD ARRANGER/MANAGER TO ARRANGE ON ITS BEHALF THE ISSUANCE OF ISLAMIC AND CONVENTIONAL PRIVATE DEBT SECURITIES, AND BANKING FACILITIES DESCRIBED IN THIS INFORMATION MEMORANDUM.

PASB HAS AUTHORISED KAF DISCOUNTS BHD ('KAF' OR THE 'LEAD ARRANGER/MANAGER') TO DISTRIBUTE THIS INFORMATION MEMORANDUM TO POTENTIAL PARTICIPANTS IN CONNECTION WITH THE AL-BAI BITHAMAN AJIL BONDS ISSUE, THE COMMERCIAL PAPERS/MEDIUM TERM NOTES PROGRAMME AND THE BANKING FACILITIES (HEREINAFTER REFERRED TO AS THE 'FINANCING FACILITIES').

THIS INFORMATION MEMORANDUM IS NOT INTENDED BY KAF TO PROVIDE THE SOLE BASIS OF ANY CREDIT OR OTHER EVALUATION, AND SHOULD NOT BE CONSIDERED AS A RECOMMENDATION BY KAF TO PARTICIPATE IN THE FINANCING FACILITIES. IN DETERMINING WHETHER TO PARTICIPATE IN THE FINANCING FACILITIES, EACH PARTICIPANT IS URGED TO MAKE ITS OWN ASSESSMENT OF THE RELEVANCE AND ADEQUACY OF THE INFORMATION CONTAINED IN THIS INFORMATION MEMORANDUM AND TO MAKE SUCH INDEPENDENT INVESTIGATION AS IT DEEMS NECESSARY FOR THE PURPOSE OF SUCH OFFICERS, EMPLOYEES, REPRESENTATIVES OR PROFESSIONAL ADVISERS (COLLECTIVELY, THE 'PARTIES') SHALL BE LIABLE FOR ANY CONSEQUENCES AS A RESULT OF THE RELIANCE ON ANY INFORMATION OR DATA IN THIS INFORMATION MEMORANDUM.

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BY RECEIVING THIS INFORMATION MEMORANDUM THE RECEIPIENT ACKNOWLEDGES THAT IT WILL BE SOLELY RESPONSIBLE FOR MAKING ITS OWN INVESTIGATIONS, INCLUDING THE COSTS AND EXPENSES INCURRED, AND FORMING ITS OWN VIEWS AS THE CONDITION AND PROSPECTS OF PASB AND THE ACCURACY AND COMPLETENESS OF THE STATEMENTS CONTAINED IN THIS INFORMATION MEMORANDUM. FURTHER,

KAF AND PASB, AND THEIR OFFICERS OR EMPLOYEES DO NOT REPRESENT OR WARRANT THAT ANY INFORMATION CONTAINED HEREIN WILL REMAIN UNCHANGED FROM THE DATE OF THIS INFORMATION MEMORANDUM,

THIS INFORMATION MEMORANDUM INCLUDES CERTAIN STATEMENT, ESTIMATES AND PROJECTIONS PROVIDED BY PASB WITH RESPECT TO ITS ANTICIPATED FUTURE PERFORMANCE. SUCH STATEMENTS, ESTIMATES AND PROJECTIONS REFLECT VARIOUS ASSUMPTIONS CONCERNING ANTICIPATED RESULTS AND SUBJECT TO SIGNIFICANT BUSINESS, ECONOMIC AND COMPETITIVE UNCERTAINTIES AND CONTINGENCIES, MANY OF WHICH ARE OR MAY BE BEYOND THE CONTROL OF PASB. ACCORDINGLY, THERE CAN BE NO ASSURANCE THAT SUCH STATEMENTS, ESTIMATES AND PROJECTIONS WILL BE REALISED. THE FORECAST AND ACTUAL RESULTS MAY VARY, AND THOSE VARIATIONS MAY BE MATERIAL. NO REPRESENTATIONS ARE OR WILL BE MADE BY KAF OR PASB AS THE ACCURACY OR COMPLETENESS OF SUCH STATEMENTS, ESTIMATES AND PROJECTIONS OR THAT ANY FORECAST WILL BE ACHIEVED.

THE CONTENTS OF THIS INFORMATION MEMORANDUM ARE STRICTLY PRIVATE AND CONFIDENTIAL AND MUST NOT BE REPRODUCED OR CIRCULATED IN WHOLE OR IN PART OR USED FOR ANY PURPOSE OTHER THAN THAT FOR WHICH IT IS INTENDED.

[34] But with respect, that latter argument was bereft of all arguable merit. In the first place, there was no approval from the Securities Commission for that disclaimer. The condition of the Securities Commission was that nothing could be amended, which meant that nothing could also be added, without its approval. KAF could not include that disclaimer in the IM, and could not contract out of its statutory duties or liabilities. Section 65 (deleted by Act 1305) of the SC Act provided that 'an agreement is void in so far as it purports to exclude or restrict the liability of a person for contravention of section 55, 57 or 58 or for loss or damage under section 153'.

[35] To counter that latter provision, it was argued that the SF agreement was between KAF and primary subscriber, that the IM was not an agreement between KAF and the bondholders, and that the disclaimer was therefore not struck down by the said s 65. That latter argument was mounted on a narrow and literal interpretation of the word 'agreement' in s 65. But that narrow and literal interpretation of the word 'agreement' in s 65 as proposed would flout commonsense (see *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191, where Lord Diplock said '… if a detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flout business commonsense, it must be made to yield to business

commonsense'). For if such a narrow and literal meaning were ascribed, then all that it would take to elude s 65 would be to label the exclusion or restriction of liability agreement as 'consent' or 'binding term' or 'condition' or any other word or phrase, just so long as it was not 'agreement'. A narrow and literal interpretation would defeat the law. Rather, the reasonable construction of s 65 must be that any term, clause, condition or provision is void in so far as it purports to exclude or restrict the liability of a person for contravention of ss 55, 57 or 58 or for loss or damage under s 153 (for the provisions that replaced those deleted by Act 1305, see the Capital Markets and Services Act 2007, which wholly came into effect on 1 April 2010).

[36] In any case, it could not be accepted that KAF owed no duties to the bondholders merely on account of the fact that KAF only contracted with the primary subscriber. By the depository and paying agency agreement dated 22 March 2004 (2846AR) and entered into between Pesaka of the first part, MTB of the second part, Bank Negara Malaysia, as the central depository, of the third part, and KAF of the fourth part, Pesaka appointed the central depository to act as depository in connection with the said bonds. The DPA agreement provided that Pesaka bonds would be traded through a scrip less book-entry securities trading and funds transfer system known as 'Real Time Electronic Transfer of Funds and Securities' ('RENTAS') (see recitals E and F). Clause 5.2 of the DPA agreement provided that the central depository (i) shall permit the said bonds' to be traded through RENTAS and (ii) maintain an electronic book-entry system in the scripless securities depository system central computer to record holdings of 'the Bonds' held and transactions of 'the Bonds' carried out by an Authorised Depository Institution ('ADI', a financial institution licensed under the Banking and Financial Institutions Act 1989 or the Islamic Banking Act 1983 who is a RENTAS member and authorised or approved by Bank Negara Malaysia to receive and make payment relating to the bonds and to effect transfers of debt securities) in accordance with the operational procedures for RENTAS. The DPA defined debt securities holders as the several persons who are for the time being the beneficial owners of the debt securities, as evidenced by the records maintained by ADIs.

[37] Right from the start, the DPA agreement was so structured for the bonds to be traded, with the bondholders for the time being as evidenced by the records maintained by ADIs. Hence, the IM could not have been only issued to the primary subscriber. The fact that the SF agreement described the first subscriber as the primary subscriber already said that there would be secondary subscribers. Indeed, that there would be secondary subscribers was stated by the DPA agreement (for instance, see cl 9.4 at 2702AR). Anyway, the first page of the IM clearly stated that it was issued to all potential bondholders/and it was futile to contend to the contrary (see *Gower's Principles of Modern Company Law* (6th Ed), at p 439; where it was proposed that the

distinction between subscribers and market purchasers in the immediate period after dealings commence is, in commercial terms, highly artificial). KAF could not elude its statutory and contractual obligations and duties under the IM and other security documents, to all bondholders, both primary and secondary.

[38] For those reasons, we unanimously affirm the decision below that KAF and MTB do make good the total loss of the bondholders, which was the sum of RM149,300,000. In the result, we unanimously dismiss with costs the appeals by KAF and MTB against the bondholders.

[39] The learned judge refused pre-judgment interests to the bondholders, against which the bondholders cross-appealed. Pre-judgment interests might not be appropriate in Islamic finance business. But compensation, could it not have been awarded? Both cl 9.4 of the SF agreement, (2702AR) and cl 4.4 of the trust deed (2591AR) identically provided 'In the event of overdue payment of any amounts due under the ABBA Bonds Issuance Facility, the issuer shall pay to the Primary Subscriber and or ABBA Bondholders compensation, on such overdue amounts at the rate and in the manner prescribed by the Syariah Advisory Council of the Securities Commission or such other relevant regulatory authority from time to time'. Only the promised payments of RM2,565,000 and RM5,950,000 (see 2466AR) towards secondary bonds were paid on time. But when default was declared on 30 September 2005, all promised payments towards primary or other secondary bonds, which then totalled RM149,300,000, fell immediately due. The SF agreement and trust deed provided that compensation on the overdue sum of RM149,300,000 would be payable to the bondholders 'at the rate and in the manner as prescribed by the Syariah Advisory Council of the Securities Commission or such other relevant regulatory authority from time to time'. There was no evidence of 'the rate and in the manner as prescribed by the Syariah Advisory Council of the Securities Council'. However, s 56(1)(a) of the Central Bank of Malaysia Act 2009 provided that 'where the proceedings relating to Islamic financial business before any court or arbitrator any question arises concerning a Shariah matter, the court or the arbitrator, as the case may be shall take into consideration any published rulings of the Shariah Advisory Council or refer such question to the Shariah Advisory Council for its ruling'. At its 50th meeting on 26 May 2005, the Syariah Advisory Council resolved 'that the court may impose late payment penalty charges on judgment debts as decided by the court (compensation) mechanisms'. The Council also resolved that the court may impose penalty charges for the actual loss (*ta'widh*), which the Council agreed to adopt the 'annual average for overnight weighted rate' of Islamic money market of the preceding rate as a reference point The bondholders who were denied the use of their money for the period 30 September 2005 to the date of judgment (not awarded by the court below —

see 72AR) had suffered an actual loss which should have been compensated. For those reasons, we unanimously allow the cross-appeal by the bondholders and order KAF and MTB to pay to the bondholders the penalty charges at the rate of 3% on the judgment sum from 30 September 2005 to the date of judgment, and the costs of the latter appeal.

[40] That latter order disposes of the appeals between KAF and MTB, and the appeals by KAF and MTB against the bondholders. Of the appeals that remain, the appeals by KAF and MTB against Pesaka could be taken, up to a point, together.

[41] KAF's claim (240–241AR) for a full indemnity from Pesaka was on the basis of the provisions of cl 13.1 of the SF agreement, which read as follows:

> The Issuer hereby, agrees that it shall fully indemnify the Facility Agent from and against any expense, loss, damage or liability (as to the amount of which the certificate of the Facility Agent shall in the absence of manifest error, be conclusive) arising out of or in connection with its duties under the Issue Documents and the costs and expenses of defending any claim or liability in connection therewith (save that the Issuer shall not be liable to the Facility Agent for any expenses, loss, damage, or liability referred to herein arising from the gross negligence or wilful misconduct or fraud or wilful default by the Facility Agent).

[42] MTB's claim for a full indemnity from Pesaka was more widely founded, on breach of contract, negligence, fraud or misrepresentation by Pesaka (see 661–664AR).

[43] Similarly pleaded they were not, but yet both claims against Pesaka were for a not dissimilar order, namely, that Pesaka do make good the loss that would be suffered by KAF and or MTB if they should be held to account to the bondholders.

[44] Pesaka's fraudulent misappropriation of the revenue was the immediate cause of its loss. It should follow, should it not, that Pesaka could not retain that unconscionable gain. Nonetheless, in this appeal, it was argued by Dato' David Morais for Pesaka that KAF must be confined to its pleadings, namely, to cl 13.1 of the SF agreement which provided that Pesaka shall not be liable to indemnify KAF for losses resulting from KAF's gross negligence. It was also argued by Dato' David Morais that MTB had acquiesced to Pesaka's operation of the said conventional account at the CIMB Cosway branch. That, in short, was Pesaka's answer and defence to the claims for indemnity, which found favour with the learned judge who held that KAF and MTB were not entitled to indemnity, by reason of their negligence.

[45] In dismissing KAF's claim against Pesaka, the learned judge gave the following reasons:

> … it is KAF's failure to ensure that MTB ultimately became the sole signatory and thereby be in the position to solely manage the designated accounts that was the reason why the repayments to the bondholders were not met in the first place. That was the cause of the Plaintiffs' loss. In my mind, it is all as a result of KAF's failure. And that failure is evidence of gross negligence on the part of KAF for the same reasons that I had explained earlier in my findings in the claim by the Plaintiffs against KAF. And for the same reasons, KAF is no longer able to rely on the indemnity claim for the same reasons of its own gross negligence. I therefore find that the claim by KAF against Pesaka not established and KAF is not entitled to be indemnified by Pesaka (see 59AR).

[46] The learned judge's reason for dismissing MTB's claim against Pesaka, Rafie, Murnina, and the Amdac Group of Companies, that is, after the learned judge had lifted the corporate veil, of Pesaka and the Amdac Group of Companies, was based on the following:

> … MTB was negligent (60AR) … that clauses 28.2 and [14.1] of the Trust Deed disallowed an indemnity claim where there was gross negligence on the part of MTB (64AR) … that the bond proceeds and said revenue were in fact used for the ordinary course of business of Pesaka, its companies and its businesses and lands ultimately acquired were for and on behalf of Pesaka (65AR) … that Pesaka had informed and procured KAF's consent for the use of the existing accounts as designated accounts, that Pesaka prepared the necessary resolutions for the change of mandate, authorisations and signatories to those accounts, that the proceeds of the bonds and monies were released into the accounts upon confirmation by the third party that the CPs Had been fulfilled, that these defendants cannot now to me to be blamed for having relied on the experts and the professionals whom they have engaged and paid for their opinion, advice and directions (65AR) … that the consent judgment which have been entered into by these Defendants with the Plaintiffs represent in my mind, the accountability of these Defendants for their acts despite the role of the other Defendants (65AR).

[47] For completeness, the aforesaid cl 14.1 of the trust deed read as follows:

> The Trustee and every other attorney, agent or other person appointed by the Trustee under the provisions of the Deed shall be entitle be indemnified by the Issuer in respect of all liabilities, costs, charges and expenses incurred by it or him in relation to this Deed and the other Issue documents to which it is a party or to the preparation and execution or purported execution thereof or to the carrying out of the trusts of this Deed or the exercise of any trusts, powers or discretions vested in it or him pursuant to this Deed and the other Issue Documents to which it is a party and against all actions, proceedings, costs, claims and demands in respect of any matter or thing done or omitted in anyway relating to this Deed in priority to any payments to the ABBA bondholders and the Trustee may retain and pay out of any

> moneys in its hands arising from this Deed all sums necessary to effect such indemnity and also the remuneration of the Trustee as hereinbefore provided, save and except for its gross negligence, wilful default, wilful breach or fraudulent actions.

[48] Negligence of KAF and MTB was held by the learned judge to have disentitled them to any indemnity from Pesaka, on account of the respective riders in cl 13.1 of the SF agreement (in the case of KAF) and cl 14.1 of the trust deed (in the case of MTB). But there was a total failure by the learned judge to enquire if those riders applied in the first place.

[49] In the first place, could an exemption clause avail to the party guilty of a wilful breach which goes to the root of the contract? In *Karsales (Harrow) Ltd v Wallis* [1956] 1 WLR 936, it was held by Lord Denning that no exemption clause however widely drafted, could avail the party guilty of a breach which goes to the root of the contract:

> Notwithstanding earlier cases which might suggest the contrary, it is now settled that exempting clauses of this kind, no matter how widely they are expressed, only avail the party when he is carrying but his contract in its essential respects. He is not allowed to use them as a cover for misconduct of indifference or to enable him to turn a blind eye to his obligations. They do not avail him when he is guilty of a breach which goes to the root of the contract.

[50] But such a doctrine of fundamental breach as a rule of law was disapproved by the House of Lords in *Suisse Atlantique Societe d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361, who held, albeit obiter, that whether an exclusion clause was applicable when there was a fundamental breach was one of the true construction of the contract. However, the doctrine of fundamental breach continued to be used until it was again disapproved by the House of Lords in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 (see *Contract Law in Malaysia* by Cheong Mei Fong, at p 203), who held that whether an exclusion clause was applicable when there was a fundamental breach was one of the true construction of the contract. On that, Their Lordships wire uncompromisingly clear:

> Much has been written about the *Suisse Atlantique* case. Each speech has been subjected to various degrees of analysis and criticism, much of it constructive. Speaking for myself I am conscious of imperfection of terminology, though sometimes in good company. But I do not think that I should be conducing to the clarity of the law by adding to what was already too ample a discussion a further analysis which in turn would have to be interpreted. I have no second thoughts as to the main proposition that the question whether, and to what extent, an exclusion clause is to be applied to a fundamental breach, or a breach of a fundamental term, or indeed to any breach of contract, is a matter of construction of the contract. Many difficult questions arise and will continue to arise in the infinitely varied situations

in which contracts come to be breached — by repudiatory breaches, accepted or not, by anticipatory breaches, by breaches of conditions or of various term negligent, or deliberate action or otherwise. But there are ample resources in the normal rules of contract law for dealing with these without the superimposition of a judicially invented rule of law: Per Lord Wilberforce.

My Lords, an exclusion clause is one which excludes or modifies general secondary or anticipatory secondary, that would otherwise arise under the contract by implication of law. Parties are free to agree to whatever exclusion or modification of all types of obligations as they please within the limits that the agreement must retain the legal characteristics of a contract; and must not offend against the equitable rule against penalties; that is to say, it must not impose upon the breaker of a primary obligation a general secondary obligation to pay to the other party a sum of money that is manifestly intended to be in excess of the amount which would fully compensate the other party for the loss sustained by him in consequence of the breach of the primary obligation. Since the presumption is that the parties by entering into the contract intended to accept the implied obligations exclusion clauses are to be construed strictly and the degree of strictness appropriate to be applied to their construction may properly depend upon the extent to which they involve departure from the implied obligations. Since the obligations implied by law in a commercial contract are those which, by judicial consensus over the years or by Parliament in passing a statute, have been regarded as obligations which a reasonable businessman would realise that he was accepting when he entered into a contract of a particular kind, the court's view of the reasonableness of any departure from the implied obligations which would be involved in construing the express words of an exclusion clause in one sense that they are capable of bearing rather than another, is a relevant consideration in deciding what meaning the words were intended by the parties to bear. But this does not entitle the court to reject the exclusion clause, however unreasonable the court itself may think it is, if the words are clear and fairly susceptible of one meaning only: per Lord Diplock.

Clauses which absolve a party to a contract from liability for breaking it are no doubt unpopular — particularly when they are unfair, which incidentally, in my view, this clause is not. It is, I think, because of the unpopularity of such clauses that a so called 'rule of law' has been developed in the Court of Appeal to the effect that what was characterised as 'a fundamental breach of contract,' automatically or with the consent of the innocent party, brings the contract to an end; and that therefore the contract breaker will then immediately be barred from relying on any clause in the contract, however clearly worded, which would otherwise have safeguarded him against being liable, inter alia, in respect of the damages caused by the default; see, for example, *Karsales (Harrow) Ltd v Wallis* [1956] 1 WLR 936, 940 per Denning LJ and *Harbutt's 'Plasticine' Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447. I entirely agree with my noble and learned friend Lord Wilberforce's analysis of the *Suisse Atlantique* case [1967] 1 AC 361 which explains why the breach does not bring the contract to an end and why the so-called 'rule of law' upon which *Photo Production* rely is therefore non-existent. This proposition is strongly supported the passage recited by Lord Wilberforce in Lord Porter's speech in *Heyman v Darwins Ltd* [1942] AC 356, 399: per Lord Salmon.

[51] *Chitty on Contracts* (30th Ed), Vol 1 concluded that there is no rule of law by which exemption clauses are rendered ineffective in the face of a fundamental breach or the breach of a fundamental term:

> It is clear that there is now no rule of law by which exemption clauses are rendered ineffective in the face of a 'fundamental breach' or the breach of a 'fundamental term'. In the *Photo Production* case, Lord Diplock stated that if the expression 'fundamental breach' is to be retained, it should in the interest of clarity, be confined to the ordinary case of a breach of which the consequence are such as to entitle the innocent party to elect to put an end to all primary obligations of both parties remaining unperformed. No express reference was made by him to the expression 'fundamental term', but the inference is that that exists no category of terms which can be said to be in any sense 'fundamental' other than 'conditions'. On this basis, it is submitted that there is no presumption that in inserting a clause of limitation or exclusion into their contract, the parties are not contemplating its application to a fundamental breach of a breach of a fundamental term. The question is in all cases whether the clause, on its true construction, extends to cover the obligations or liability which it sought to exclude or restrict (*Chitty*, para 14–024).
>
> The law is that 'no exemption clause can protect a person from liability for his own fraud [Chitty meant the fraud within the context of section 17of our Contracts Act 1950] or require the other party to assume what he knows to be false. But is it uncertain whether, there is any rule of law, based on public policy, which would prevent the exclusion by a principal of liability for fraud on the part of his agent acting as such. It is, however, clear that any such exclusion would have to be expressed in clear and unmistakable terms on the face of the contract so as to leave the other party in no doubt that fraud was covered' (*Chitty*, para 14–136).

[52] Post *Photo Production*, it has been accepted locally that whether an exclusion clause applies is a matter of construction. In *Wee Lian Construction Sdn Bhd v Ingersoll-Jati Malaysia Sdn Bhd* [2005] 1 MLJ 162, RK Nathan J held 'that the doctrine of fundamental breach by virtue of which the termination of a contract brought it, and, with it, any exclusion clause to an end was not good law; that the question whether and to what extent an exclusion clause was to be applied to any breach of contract was a matter of construction of the contract …' Abdul Malek Hj Ahmad J, as he then was, in *Robert Bosch (SEA) Pte Ltd v Goh Ban Huat Bhd* [1996] 1 AMR 714, and Ramly Ali J, as he then was, in *Isito Electronics Sdn Bhd v Teh Ah Kiam & Anor* [2004] 7 MLJ 513, also agreed that the applicability of an exclusion clause is solely a matter of construction.

[53] Hence, what was agreed must be resolved by the proper construction of the said exclusion clauses (for the general principles of construction of contract, see *Hotel Anika Sdn Bhd v Majlis Daerah Kluang Utara* [2007] 1 MLJ 248) which must be construed strictly contra proferentem (*Anderson v Fitzgerald* (1853) 4 HLC 484; (1853) 10 ER 551; *Guardian Assurance Co Ltd v Condogianis* (1919) 26 CLR 231).

[54] In *Hong Realty (Pte) Ltd v Chua Keng Mona* [1994] 3 SLR 819, 825, [1994] Karthigesu JA said:

> It is trite law that exemption clauses must be construed strictly and this mean that their application must be restricted to the particular circumstances the parties had in mind at the time they entered into the contract. On any view of the matter the respondent and the appellants could not have intended that the exemption clauses in the contract of bailment would apply when some act had intervened to alter the circumstances in … which the exemption clauses would ordinarily apply.

[55] Clause 13.1 of the SF agreement provided that KAF would be indemnified 'save that the Issuer shall not be liable to the Facility Agent for any expenses, loss, damage, or liability referred to herein arising from the gross negligence or wilful misconduct or fraud or wilful default by the Facility Agent'. Clause 14.1 of the trust deed provided that MTB would be indemnified 'save and except for its gross negligence, wilful default, wilful breach or fraudulent actions'. Although differently worded, but yet both exemption clauses excluded indemnity where loss was occasioned by gross negligence, wilful misconduct or fraud or wilful default by KAF or MTB. Those were the particular circumstances that the parties had in mind at the time when they entered into the SF agreement or trust deed. Both exemption clauses must be strictly construed to mean that their application must be restricted to those particular circumstances of gross negligence, wilful misconduct or fraud or wilful default by KAF and or MTB. But both exemption clauses did not provide for the circumstance of fraud by Pesaka (fraud by Pesaka was by its wilful act that deprived, by inequitable means, the revenue that belonged to the bondholders; see *Kerr on the Law of Fraud and Mistake* (7th Ed), at p 1). So, could KAF or MTB have intended that the exemption clauses would apply even when some act had intervened to alter the circumstances in which those exemptions clauses would ordinarily apply? Could KAF or MTB have intended that the exemption would apply even when there was fraud by Pesaka? But it should not seem that KAF or MTB could have intended so, as contacting 'parties … assume the honesty and good faith of the other; absent such an assumption they will not deal' (*HIH Casualty and General Insurance Ltd & Ors v Chase Manhattan Bank & Ors* [2003] 2 Lloyd's Rep 61, 68 per Lord Bingham). Since honesty was assumed, it could not have been contemplated by KAF or MTB that the exemption clauses applied even when there was fraud by Pesaka. KAF and or MTB could not have intended that the exemption clauses would apply even when fraud by Pesaka had intervened to alter the circumstances in which those exemption clauses would ordinarily apply. If that had been intended, then it should have been expressed in clear and unmistakable terms on the face of the SF agreement and trust deed so as to leave KAF or MTB in no doubt that fraud by Pesaka was covered. Clause 13.1 of the SF agreement and cl 14.1 of the trust deed, on its true construction, could not reasonably have been intended to apply even when fraud by Pesaka

had intervened to alter the circumstances in which those exemption clauses would ordinarily apply. Any other construction would mean that Pesaka could break every covenant with impunity. And that absurd result could never be right. Suffice it to say that those exemption clauses could not avail to Pesaka as a defence.

[56] The other 'defence', that the conduct of MTB had deprived MTB of the right to any indemnity, triggered us to consider the leading case of *Dering v Earl of Winchelsea* [1775–1802] All ER Rep 140, also reported 1 Cox Eq Cas 318; 2 Bos & P 270; 29 ER 1184, where the facts were as follows. 'Thomas Dering was appointed collector of customs duties and was required to furnish three securities for the due performance of this office. The three sureties were his brother (Sir Edward Dering), the Earl of Winchelsea and Sir John Rous. Thomas Dering defaulted to the extent of £3,883 14s and the Crown obtained judgment against Sir Edward Dering for that sum. Sir Edward then claimed contribution from his co-sureties. This was resisted by the Earl of Winchelsea on two grounds, one of which was that the conduct of Sir Edward Dering had deprived him of that right. On this the Lord Chief Baron commented —' (*Equity* by Keeton & Sheridan, at p 30):

> The misconduct imputed to the plaintiff is that he encouraged his brother in gaming and other irregularities; that he knew his brother had no fortune of his own, and must necessarily be making use of the public money, and that the plaintiff was privy to his brother's breaking the orders of the Lords of the Treasury to keep the money in a particular box, and in a particular manner, etc. This may all be true, and such a representation of the plaintiff's conduct certainly places him in a bad point of view; and perhaps it is not a very decorous proceeding in the plaintiff to come into this court under these circumstances. *He might possibly have involved his brother in some measure, but yet it is not made out to the satisfaction of the court that these facts will constitute a defence.* It is argued that the author of the loss shall not have the benefit of a contribution; but no cases have been cited to this point, nor any principle which applies to this case. It is not laying down any principle to say that his ill-conduct disables him from having any relief in this court. *If this can be founded on any principle, it must be that a man must come into a court of equity with clean hands, but when this is said it does hot refer to a general depravity: it must have an immediate and necessary relation to the equity sued for; it must be a depravity in a legal as well as in a moral sense.* In a moral sense, the companion, and perhaps the conductor, of Thomas Dering, may be said to be the author of the loss, but to legal purposes Thomas Dering himself is the author of it; and if the evil example of the plaintiff led him on, this is not what the court can take cognisance of. (Emphasis added.)

[57] Another leading case which held that there is no general depravity of a right unless it has an immediate relation to the equity sued for was *Tinsley v Milligan* [1993] 3 All ER 65, where the facts were as follows. T and M jointly purchased a house which was registered in the name of T as sole name of T to enable M, with the knowledge and assent of T, to make false claims to the

Department of Social Security tor benefits. Subsequently, T and M quarreled. T moved out, leaving M in occupation. T brought an action claiming possession of the house and asserting ownership of it. M counterclaimed for an order for sale and a declaration that the house was held by T on trust for the parties in equal shares. T contended in regard to the counterclaim (i) that, applying the common law maxim *ex turpi causa non oritur actio*, M was barred from denying T's ownership of the house because the purpose of the arrangement whereby the house had been registered in the sole name of T had been to facilitate the fraud on the Department of Social Security and therefore her claim to joint ownership was tainted by illegality and (ii) that, applying the equitable principle that he who came to equity had to come with clean hands, the court ought to leave the estate to lie where it fell since the property had been conveyed into the name of one party for a fraudulent purpose which had then been carried out and in those circumstances the court ought not to enforce a trust in favour of the other party. The judge dismissed T's claim and gave judgment for M on her counterclaim. T appealed to the Court of Appeal, which dismissed the appeal, holding that when confronted with the defence of illegality the court should adopt a flexible and pragmatic approach in applying the maxim *ex turpi causa non oritur actio* and the equitable principle of clean hands and should determine whether enforcement of the claim with its attendant illegality would be an affront to the public conscience and that, since both parties had collaborated in the fraud and both their claims were tainted with illegality and it would be a disproportionate penalty to deprive M of her share of the house, it would be an affront to the public conscience not to grant her relief. T appealed to the House of Lords, who held that where property interests were acquired as a result of an illegal transaction a party to the illegality could recover by virtue of a legal or equitable property interest if, but only if, he could establish his title without relying on his own illegality even if it emerged that the title on which he relied was acquired in the course of carrying through an illegal transaction.

[58] Similarly, in the instant case, the conduct or misconduct imputed to MTB could not constitute a defence to Pesaka for its wilful act that deprived, by inequitable means, the revenue that belonged to the bondholders. For notwithstanding MTB's breach of duty or negligence or whatever, it remained that Pesaka could not by any wilful act deprive the bondholders of the revenue. Whether MTB was vigilant or not, it remained that Pesaka could not capitalise on whatever lapse to seize the revenue. For notwithstanding the negligence of MTB, there would yet not have been any loss to the revenue had Pesaka honoured its covenants. It was only because Pesaka had not honoured its covenants that KAF and MTB had to indemnity the bondholders. And KAF and MTB could assert its right to indemnity, as the negligence and or misconduct to KAF or MTB had no immediate relation to the relief which KAF and MTB had made out without any reliance on their own negligence

and or misconduct. KAF and MTB should not have been deprived of relief just on account of its negligence or misconduct.

[59] But unfortunately, it was not at all appreciated by the learned judge that KAF and MTB incurred liability and loss solely because of Pesaka's wilful act. Pesaka must answer to KAF and MTB. Negligence of KAF or MTB was no defence. In a claim for restitution, would it be a defence to say 'I took it when you were not looking'. It would not, surely not.

[60] The learned judge shored up the dismissal of MTB's claim with the following 'reasons', namely (i) 'that the bond proceeds and said revenue were in fact used for the ordinary course of business of Pesaka, its companies and its businesses and lands ultimately acquired were for and on behalf of Pesaka' (65AR), (ii) that Pesaka had informed and procured KAF's consent for the use of the existing accounts as designated accounts, that Pesaka prepared the necessary resolutions for the change of mandate, authorisations and signatories to those accounts, that the proceeds of the bonds and monies were released into the accounts upon confirmation by the third party that the CPs had been fulfilled, that these defendants cannot now to me to be blamed for having relied on the experts and the professionals whom they have engaged and paid for their opinion, advice and directions (65AR), and (iii) that the consent judgment which have been entered into by these defendants with the plaintiffs represent in my mind, the accountability of these defendants for their acts despite the role of the other defendants (65AR).

[61] But with respect to the learned judge, it was not at all appreciated that the revenue belonged to the bondholders. The revenue was not there for Pesaka to use, for whatever reason or purpose. It was as simple as that. An account by a bank manager who had emptied the vault, on the whereabouts of the monies taken, would be no defence. Just because Pesaka could account on the whereabouts of the revenue was also no defence, nor was it of any consolation to KAF or MTB. The simple truth was that 'ring fenced' or not, Pesaka, could not touch the revenue, and why Pesaka had done so, even because professionals had advised so, was no defence. The consent judgment was also no defence, as that consent judgment was no substitute for the revenue which should not have been touched in the first place. With due respect to the learned judge, the consent judgment was not accountability by Pesaka. Accountability would be the return of the revenue, nothing less, nothing more. The consent judgment was no more than a judicial admission by Pesaka that it had misappropriated the revenue that rightly belonged to the bondholders. That consent judgment would not save KAF or MTB from action by the bondholders. In so far as KAF and MTB were concerned, that consent judgment might as well have been naught. Just how that consent judgment could be held to deny the right of KAF and or MTB to indemnity is simply beyond comprehension.

[62] In the final analysis, the loss was all because of Pesaka's wilful act. But yet the learned judge wholly exculpated Pesaka. Mr Lazar analogised that the learned judge faulted the watchman but absolved the thief. The less biting analogy perhaps, would be that the learned trial judge faulted the solicitor, for negligently releasing whatever security, but refused the solicitor's claim for restitution from the party in wrongful possession of the security. It could also be put like this. KAF and MTB who were negligent must make good the loss to the bondholders. It was Pesaka who caused KAF and MTB to suffer for their negligence. It would follow that Pesaka must indemnify KAF and MTB. On the facts, there was plainly no defence. If all things had been properly considered, the only reasonable outcome should have been judgment to KAF and MTB against Pesaka. This is more than a compelling case for appellate interference. For those reasons, we unanimously allow the appeals of KAF and MTB against Pesaka.

[63] Even so, we do not see it fit to order a full indemnity. A full indemnity would mean that KAF and MTB were blameless, which they were not. In fact, both highly paid professional lead arranger/facility agent and trustee were found totally wanting in all respects. Both must bear their share of responsibility for the bond default which could have knocked all confidence out of the local bond market. For those false and misleading statements in the IM, for their general indolence, for their desertion from their posts, and for their general disregard for the interests of the bondholders, we are of the unanimous view that KAF and MTB should jointly bear 1/3 of the total loss of RM149,300,000 together with all penalty charges. With that deduction, we unanimously order Pesaka (i) to pay KAF and MTB, the sum of 2/3 of RM149,300,000 together with penalty charges at the nominal rate of 3% on 2/3 of RM149,300,000 from 30 September 2005 to the date of judgment, and penalty charges at the rate of 4% on 2/3 of RM149,300,000 from the date of judgment to date of satisfaction, and, (ii) to pay to KAF and MTB the costs of their appeals.

[64] The lifting or not of the corporate veil of Pesaka and the Amdac Group would not matter had MTB's claim against Pesaka been dismissed. But that matters now to MTB (there was no claim by KAF against Rafie, Murnina and the Amdac Group), as judgment creditor, to reach the assets of Pesaka.

[65] The learned judge held that it was an appropriate case for the lifting of the corporate veil:

> These are my findings. I in fact first of all agree that this is an appropriate case for the lifting of the veil of incorporation as the evidence indicates that all the activities of Pesaka as well as the sixth to 12th defendants were directed for the benefit of Dato' Rafie who together with her wife own [90%] of Pesaka. Datin Murnina may say that the shares were held by her on trust for husband and that he does not seem to have

considered her as joint owner but merely as holding the properties on his behalf. I agree with Mayban Trustees' proposition that the impression given of them being in control, these two defendants being in control of Pesaka and its group of companies is consistent with the fact that Dato' Rafie himself had given evidence that he considered Pesaka his personal property and he exercised actual control over them including the monies and the accounts though they were carried put by other personnel in his companies. I'm not going to set out, I agree that on the findings revolved around the reasoning in *Wallersteiner v Moir*, *Gilford Motor*'s case to find that the directing mind and controlling minds behind Pesaka and the Amdac Group of companies is the defendants. In my view, Datin Murnina remains liable even if she chose not to know or if she allowed herself to be used by Dato' Rafie regardless of her personal reasons as to me she has chosen to enter into the realm of the corporate world and engage with the public especially in matters concerning raising public funds through this bond issue. It's not an uncommon feature today that many now choose to work from home without the benefit of office space, without attending meetings and without even email particularly in this 21st century. It would be disastrous if directors such as Datin Murnina would be absolved from accountability for the reasons that she has proffered. Here monies moved in and out of the accounts and she signed for such movements and was the recipient of these monies insofar as these investment and shares were in her name. Therefore I find that she knowingly received proceeds of the trust money and for these reasons she has rightly been brought in.

With regards Dato' Rafie, he too was aware of the movements of the money. He was well appraised in the nature of the monies and the accounts to which these monies were to be deposited. He admitted that the funds Pesaka were utilised to invest in the sixth to 12th defendants, in various investment both locally as well as abroad and the common pattern was always that as it ultimately would be in either his or his and his wife's name. But he maintained that these dealings were proper as his interests were automatically held on trust for Pesaka.

In my judgment, the evidence point to Dato' Rafie treating Pesaka as his personal property. Insofar as the proceeds of the government contracts are concerned, this cannot be so as these are trust properties. He had personal knowledge that the monies transferred were not in the ordinary course of business and he used monies that he knew were from existing contracts. I agree with learned counsel for Mayban Trustees that Dato' Rafie's excuse that he applied the trust monies under the belief that he was entitled to do so for operational purposes so long as they were repaid seven days before the due date as untenable.

However, these determinations of mine only pertain to the lifting of the corporate veil. In lifting the veil, I find that in fact Dato' Rafie is the directing mind behind Pesaka and the Amdac Group. But to me that however does not resolve the matter. There are still the defences to consider.

[66] There was no appeal by Pesaka, Rafie, Murnina, or the Amdac Group to challenge the lifting the corporate veil or to contest those findings of fact (see above) that led the learned judge to lift the corporate veil. Mr Wong Kian Keong for Murnina nonetheless submitted that there was no case for the lifting of the corporate veil. But on the basis of high authority, it would seem that no

credence should be given to that submission. In *HSBC Bank Malaysia Bhd v Dharani Sugars & Chemical Ltd and another appeal* [2011] 1 MLJ 52, the Federal Court per Richard Malanjum CJ (Sabah and Sarawak) held as follows:

> With respect we find such submissions contrary to what were said before and by the Court of Appeal. Obviously the plaintiff is now rejecting the findings of the Court of Appeal and its own earlier stand. There is no appeal by the plaintiff against the findings and conclusions made by the Court of Appeal. As such we therefore decline to give any credence to such submissions.

[67] Where a finding has been made against which there is no appeal, it cannot, later, be contended to the contrary. In *Maslinda bt Ishak v Mohd Tahir bin Osman & Ors* [2009] 6 MLJ 826, the Court of Appeal per Suriyadi JCA, as he then was, stated as follows:

> Federal counsel for the respondents began, as per the written submission that the photographs did not show the appellant in the act of urinating. The oral testimony was a fabrication and had been discredited by the documentary evidence. This at best was an unusual submission as both parties had agreed, and admitted further in the statement of defence, that she indeed did urinate in the truck. The fact that the learned judge decided against the first defendant shows that the appellant had established all the necessary ingredients for a case based on a balance of probability. The learned judge in her grounds of judgment elucidated, 'Saya mendapati bahawa tindakan defendan pertama mengambil gambar-gambar plaintiff yang sedang membuang air kecil …' in no uncertain terms established that a finding of fact had been made. As there was no appeal on this finding, it was too late in the day for the respondent's counsel to touch on the facts, which culminated in that submission.

[68] And the same issue cannot be re-litigated without an appeal. In *Ramlah bte Abdullah v Talasco Insurance Sdn Bhd & Anor* [2009] 3 MLJ 474 the Court of Appeal, per James Foong JCA, as he was, held as follows:

> So irrespective of the findings of the trial judge in this case, the issue on whether Proton had ordered or given permission to Wan Din to drive the said car at the material time has already been decided by the sessions court in Civil Action No 53–100 of 1998. Relying on the principle of res judicata, this same issue should not be litigated again. This matter has been decisively determined and there was no appeal against it. When this finding has a binding effect, it is our view that the policy of insurance issued by Talasco to Proton is ineffective (since it does not cover a person who is driving without the order or permission of the policy holder) for the purpose of this recovery claim.

[69] Be that as it may, we are nonetheless of the unanimous view, that is, after all consideration of the facts and circumstances, that the corporate veil should be lifted. On that, we are at one with the learned judge. First, it was all so evident that Rafie and Murnina absolutely ruled the roost. That was evident

from the pleadings alone. Pesaka, Rafie and the Amdac Group pleaded (i) that all major decisions of Pesaka were taken by Rafie (183AR), (ii) that the only directors of the Amdac Group of Companies was Rafie and Murnina and Murnina practically owned the entire equity of the Amdac Group of Companies (save for the eighth defendant — Amdac Capital) (183AR read together with 152AR). Pesaka, Rafie and the Amdac Group pleaded that 'the shares of the Amdac companies although in the names of Rafie and Murnina, were at all material times, held upon trust for Pesaka and the Amdac companies were treated as part of the Pesaka Group of Companies' (183AR). And Murnina pleaded that all her shares in Pesaka were held upon trust for Rafie (207AR) and that all her shares in the Amdac Group were held upon trust for Pesaka (207AR read together with 152AR). Given that state of the pleadings, the original defendants admitted that Rafie owned both Pesaka and the Amdac Group through Pesaka, and that Murnina who was a bare trustee for Rafie or Pesaka owned nothing in her own right.

[70] The evidence was no different. Rafie testified that whatever belonged to him belonged to Pesaka (1730AR), that he and Murnina owned nearly 90% of Pesaka (1730AR) and that he regarded Pesaka as his personal property (1730AR) and or as his family company (1731AR). Murnina testified that all her shares in the Amdac Group were held upon trust for Pesaka (1382AR) and or Rafie (1407AR), that her Bukit Jelutong lands were held upon trust for Pesaka (1407AR), and that her 87% of the issued capital of Pesaka was held upon trust for Rafie (1398AR). The trust deeds dated 9 June 1997 (8133AR) and 11 June 2003 (8134AR) also confirmed that Murnina held all her shares in Pesaka upon trust for Rafie.

[71] It could not be any clearer. The directing minds of Pesaka and the Amdac Group were Rafie and Murnina who had absolute control of those companies at all material times. Rafie and Murnina were the principals behind Pesaka and the Amdac Group. Rafie, Murnina and the Amdac Group were indistinguishable as separate economic units. All notional separateness could be disregarded (*Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor* [1996] 3 MLJ 533). And with their absolute control of Pesaka and the Amdac Group, Rafie and Murnina had fraudulently transferred the revenue to Murnina and the Amdac Group who had no right whatsoever to that revenue or to retain or use the same for whatever reason or purpose, in breach of every covenant that they, through their alter ego, had entered into with KAF and MTB. Murnina, who had signed the security documents and the instructions to the CIMB Cosway branch to transfer the revenue to herself and to the Amdac Group, and so was right up to her neck in complicity in the loss of the revenue, could not play humble housewife to feign ignorance. The indisputable truth was that Rafie and Murnina, with their dominion through Pesaka over the revenue, had fraudulently misappropriated and converted the revenue that belonged to the

bondholders, in violation of the security documents. That was fraud, plain and simple, in every sense of the word. The veil of corporation must be ignored in the face of this unashamed fraud on KAF, MTB, and the bondholders (see *Re Darby ex parte Brougham* [1911] 1 KB 95). Rafie and Murnina and the Amdac Group should not be allowed to claim limited liability through the corporate shield. The court should pull aside the corporate veil and treat Pesaka and the Amdac as being their creatures, for whose doings they (Rafie and Murnina) should be responsible (see *Wallersteiner v Moir; Moir v Wallersteiner & Ors* [1974] 3 All ER 217). There was only justification to pierce the corporate veil, to ascertain the actual ownership of assets (*Aspatra Sdn Bhd & 21 Ors v Bank Bumiputra Malaysia Bhd & Anor* [1988] 1 MLJ 97), to enable creditors to reach the assets of Rafie, Murnina and the Amdac Group. If not, then Rafie and Murnina and the Amdac Group would make off with the revenue. Justice positively demanded that Rafie, Murnina, and the Amdac Group be ordered to indemnify MTB (see *Jones and another v Lipman and another* [1962] 1 All ER 442, where the first defendant, who had agreed to sell his property to the plaintiffs for £5,250, then sold and transferred it to a company which he controlled, for £3,000, and where the plaintiff obtained a decree of specific performance against the company; see also *Gilford Motor Co v Horne* [1933] Ch 935, where an employee set up a company and acted through that to avoid his agreement not to compete with his former employer, and where the veil was lifted and an injunction was issued against the company too). In any case, it would only seem right, since the original defendants contended that all revenue had been invested for and or were held upon trust for Pesaka, that the original defendants, including Murnina who admitted that nothing belonged to her, do regurgitate that revenue or its 'invested' form, to creditors of Pesaka. For those reasons, we unanimously order Rafie, Murnina and the Amdac Group to pay to MTB, the sum of half of 2/3 of RM149,300,000 together with penalty charges at the nominal rate of 3% on half of 2/3 of RM149,300,000 from 30 September 2005 to the date of judgment, and penalty charges at the rate of 4% on half of 2/3 of RM149,300,000 from the date of judgment to date of satisfaction, and, (ii) to pay to MTB the costs of the MTB's appeal against them.

[72] The last appeal, also from MTB, was against the dismissal of its claim for damages from CIMB, whom MTB claimed was a constructive trustee of the revenue, that by reason of Pesaka's notices dated 19 March 2004 to the CIMB Cosway and Subang branches that Pesaka had assigned and charged all rights and title in and to those said conventional accounts to MTB (see 3727 and 3729AR). That notice dated 19 March 2004 read as follows:

PESAKA ASTANA

Integration Unlimited

19 March 2004

Bumiputra-Commerce Bank Berhad

Cawangan Wisma Cosway

Ground Floor, Wisma Cosway

50200 Kuala Lumpur

Dear Sirs

Assignment of Designated Accounts in favour of Mayban Trustees Berhad

1.We hereby give you notice that we have on 19 March 2004 pursuant to a charge dated 19 March 2004 (the 'Assignment and Charge') assigned and charged to Mayban Trustees Berhad (the 'Trustee') as security trustee for certain parties set out in the Assignment and Charge (together the 'Secured Parties') all our present and future rights, title and interest in and to the account (Account No: 1410-4003632-059) ('Designated Account') with you and in our name; and all amounts from time to time and at any time standing to the credit of Designated Account(s). A copy of the Assignment and Charge is enclosed herewith.

2.We hereby confirm that we will remain liable to you to perform all the obligations assumed by us in relation to the Designated Account(s) that neither the Trustee nor the Secured Parties will be under obligation of any kind whatsoever in relation thereto.

3.We hereby irrevocably authorize and instruct you to pay to the Trustee (whose receipt shall be a full and sufficient discharge to you any such payment) all amounts whatsoever due or owing to us under or by virtue of the Designated Account(s) to act upon the instructions of the Trustee in relation to any withdrawals or other matters relating to the Designated Account(s).

4.Would you please acknowledge receipt of this notice by signing on the acknowledgement endorsed on the enclosed copies of this notice and delivering one copy to us and the other copy to the Trustee.

Dated this 19th day of March 2004

For PESAKA ASTANA (M) SDN BHD (Company No. 232837-A)

Sgd.

Dato' Mohamed Rafie Bin Sain

Chief Executive Officer

Acknowledgement by Bumiputra-Commerce Bank Berhad

To

(1)MAYBAN TRUSTEES BERHAD

34th Floor, Menara Maybank

100 Jalan Tun Perak

50050 Kuala Lumpur

(2)PESAKA ASTANA (M) SDN BHD

Jalan Utarid

U5/12(PS), Section U5

40150 Shah Alam

Selangor

PESAKA ASTANA (M) SDN BHD

We hereby acknowledge receipt of the notice on which this acknowledgement is endorsed and hereby confirm and agree that we:

(a) consent to the assignment referred to in the notice;

(b) have not received notice of any assignment or other security interest of over the Designated Account(s);

(c) will not exercise any rights of combination, consolidation, merger or set off against any amounts from time to time and at any time standing to the credit of the Designated Account(s);

(d) will procure that payments are made to the Trustee in accordance with the authority and instruction contained in paragraph 3 of the notice and will only

(e) will send to the Trustee copies of all statements and notices given by us to PESAKA ASTANA (M) SDN BHD in connection with the Designated Account(s).

2. We further hereby acknowledge that the Trustee will be under no obligation to us for any costs and expenses incurred in respect of the opening, maintenance and operation of the Designated Account(s).

Dated day of, 2004

……..

for Bumiputra-Commerce Bank Berhad

[73] MTB contended that CIMB ought not to have allowed Pesaka's transfers of revenue from that conventional account at the CIMB Cosway branch, and that had CIMB done so, then there would not have been those fraudulent transfers and the loss of the revenue. CIMB, who did not dispute that those notices of assignment (but not the enclosures) were indeed received by the CIMB Cosway branch, contended that the said assignment required but had not obtained CIMB's consent and or acceptance, that the signatories of the account at the CIMB Cosway branch had not been changed from nominees of Pesaka to nominees of MTB, and that without a change of the mandate being effected, CIMB had to execute the instructions of Pesaka or the instructions of the nominees of Pesaka.

[74] The learned judge dealt with MTB's claim against CIMB as follows: A

> The final claim — this is Mayban Trustee's claim against the second plaintiff. The claim here is for all sums that were paid into and out of the revenue account as well as the FSRA which were accounts held with the second plaintiff. This claim is brought on behalf of all the bondholders pursuant to its duties under the trust deed and in this sense it was submitted by Mr Gopal Sreenevasan, learned counsel for the second defendant that the counterclaim stands separate from any defence that Mayban Trustees has taken to date, the claim of the second defendant here against the second plaintiff is one founded in negligence and for breach of duties and obligations as constructive trustees for Mayban Trustees as well as the other bondholder plaintiffs. B C
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> In the particulars pleaded, it can be summarised that what Mayban Trustees is claiming is that the second plaintiff ought to have notified Mayban Trustees upon receipt of the notices of the assignment that existing accounts were going to be used as designated accounts and that it was wrong for the second plaintiff to allow the withdrawals from these accounts despite those notices being sent; and it was negligent in not monitoring the accounts for the benefit of the bondholders. That is, if I may summarise is what the claim of Mayban Trustees is against the second plaintiff. The claim is disputed by the second plaintiff on the basis that the notices were not received and this is a requirement under s 4(3) of the Civil Law Act before an assignment can be said to exist. The response of the second plaintiff also is that the requisite mandate documents had not been submitted to Mayban Trustees to operate the accounts to the second plaintiff so that these accounts now become designated accounts and that the mandate and the relationship between the second plaintiff and Pesaka prevail over the notices that had been sent. D E
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> Having heard the witnesses and having examined their evidence before me, I find that the notices have indeed been served on the second plaintiff's branches at Cosway as well as Subang. The conditions for the assignment exist and Mayban Trustees as assignee therefore has a right to sue for the monies that had been signed to Mayban Trustees by Pesaka. But that really is not the basis of the action by Mayban Trustees against the second plaintiff. It cannot be ignored as I have repeatedly said this morning that Mayban Trustees was aware as early as February 2004 that existing accounts were going to be used as designated accounts and yet it did nothing. I find it difficult to accept that the real trustee who, given that it is aware of its obligations and duties now point its fingers at another and alleges that the other, the bank where the accounts are held, are now to be found as constructive trustees who are obliged to inform these trustees of the use of the accounts as designated accounts; and that this bank now has an obligation to prevent withdrawals as well as a duty to monitor the account acting, as if it was the trustees. F G H
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> The law of constructive trust must be examined in the context of regular banking relationship which the plaintiff actually has with Pesaka. That relationship is primary to the obligations of the second plaintiff. I agree with what Mr Thomas said that the relationship of banker and customer is a single binding contract that regulates the rights and obligations of these two parties to one another. Mayban Trustees was going to become a potential client and it was its responsibility to see to the change of signatories being affected. And until that is done and while there may be a notice of assignment, the underlying binding banker customer relationship and I

the equally binding mandates will govern and prevail. I do not find dishonesty, dishonest assistance or knowing receipt as suggested by learned counsel for the second defendant. There are cogent reasons to hold that the binding relationship of banker customer prevails over the notices. And, in the circumstances I would also dismiss the counterclaim against the second plaintiff with costs (see 69–71AR).

[75] We perceive the issue as whether there was a duty on CIMB to hold onto the said revenue, regardless of the fact that the mandates of the said account had not been changed. In relation to that issue, it would be worthwhile to note that the circumstances in which justice and good conscience require a trust to be imposed are obscure and are not closed. *Snell's Principles of Equity* (28th Ed), at p 192 states:

> No satisfactory definition of a constructive trust has yet been enunciated, and perhaps none ever will be; for the concept is still uncertain and the boundaries obscure. A possible definition is that a constructive trust is a trust which is imposed by equity in order to satisfy the demands of justice and good conscience, without reference to any express or presumed intention of the parties. 'A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee'. Yet general statements such as these leave unexplained the circumstances in which justice and good conscience require a trust to be imposed; and it may be impossible, and perhaps undesirable, to define or limit those circumstances.

[76] Sri Ram FCJ in *Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 2)* [2010] 2 MLJ 181 clearly recognised that it is nay impossible to circumscribe be all the circumstances that give rise to a constructive trust.

> So far as relief is concerned in a case as the present, we derive much assistance from the speech of Lord Scott of Foscote in *Yeoman's Row Management Ltd & Anor v Cobbe* [2008] UKHL 55 where he said:
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> > It is impossible to prescribe exhaustively the circumstances sufficient to create a constructive trust but it is possible to recognise particular factual circumstances that will do so and also to recognise other factual circumstances that will not. A particular factual situation where a constructive trust has been held to have been created arises out of joint ventures relating to property, typically land. If two or more persons agree to embark on a joint venture which involves the acquisition of an identified piece of land and a subsequent exploitation of, or dealing with, the land for the purposes of the joint venture, and one of the joint venturers, with the agreement of the others who believe him to be acting for their joint purposes, makes the acquisition in his own name but subsequently seeks to retain the land for his own benefit, the court will regard him as holding the land on trust for the joint venturers. This would be either an implied trust or a constructive trust arising from the circumstances and if, as would be likely from the facts as described, the joint venturers have not agreed and cannot agree about what is to

be done with the land, the land would have to be re-sold and, after discharging the expenses of its purchase and any other necessary expenses of the abortive joint venture, the net be done with the land, the land would have to be re-sold and, after discharging the expenses of its purchase and any other necessary expenses of the abortive joint venture, the net proceeds of sale divided equally between the joint venturers.

[77] In *Tay Choo Foo @ Tay Chiew Foo v Tengku Mohd Saad @ Tengku Arifaad bin Tengku Mansur & Ors (all acting as administrators of the estate of Tunku Mansur bin Tunku Yaacob, deceased) and another appeal* [2009] 1 MLJ 289, the Court of Appeal adopted the exposition by Lord Denning in *Hussey v Palmer* [1972] 3 All ER 744, on the meaning of constructive trusts:

Although the plaintiff alleged that there was a resulting trust, I should have thought that the trust in this case, if there was one, was more in the nature of a constructive trust; but this is more a matter of words than anything else. The two run together, By whatever name it is described, it is a trust imposed by law whenever justice and good conscience require it. It is a liberal process, founded on large principles of equity, to be applied in cases where the defendant cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or a share in it. The trust may arise at the outset when the property is acquired, or later on, as the circumstances may require. It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution. It is comparable to the legal remedy of money had and received which, as Lord Mansfield said, is very beneficial and, therefore, much encouraged. Thus we have repeatedly held that, when one person contributes towards the purchase price of a house, the owner holds it on a constructive trust for him, proportionate to his contribution, even though there is no agreement between them; and no declaration of trust to be found, and no evidence of any intention to create a trust. Instances are numerous where a wife has contributed money to the initial purchase of a house or property; or later on to the payment of mortgage instalments; or has helped in a business: see *Falconer v Falconer* [1970] 3 All ER 449; [1970] 1 WLR 1333), *Heseltine v Heseltine* [1971] 1 All ER 952; [1971] 1 WLR 342) and *Re Cummins (deed), Cummins v Thompson* [1971] 3 All ER 78; [1972] Ch 62. Similarly, when a mistress has contributed money, or money's worth, to the building of a house: *Cooke v Head* [1972] 2 All ER 38; [1972] 1 WLR 518). Very recently a purchaser has been held to hold on trust for an occupier: *Binions v Evans* [1970] 2 All ER 70; [1972] Ch 359. In all those cases it would have been quite inequitable for the legal owner to take the property for himself and exclude the other from it. So the law imputed or imposed a trust for his or her benefit.

[78] On 19 March 2004, Pesaka notified the CIMB Cosway branch that Pesaka had assigned and charged all rights and title in and to those said conventional accounts to MTB. That notice was effectively ignored by CIMB, which begs the question, could CIMB do so? The following cases shed much light.

[79] In *Stevens v Stevens* [2006] OJ No 2755, where Ms Stevens had served the following notice on the Royal Bank of Canada 'If Ms Stevens is successful in her claims, [Mr Nagtzaam] would have no interest in the matrimonial home as he would hold his interest in trust for Ms Steven. [Ms Stevens] is claiming that Mr. Nagtzaam holds his one half interest in the matrimonial home in trust for her,' the Ontario Court of Appeal held that 'This language clearly put the bank on notice of a trust claim by Ms Stevens concerning the matrimonial home, at a time when it was open to the bank to take action to protect its position'.

[80] In *Nayar Modern Bank, Ltd v Official Liquidators of the Travancore National and Quilon Bank, Ltd* (1940) 2 Madras Law Journal 559, the facts were as follows. By reason of s 282-B(1) of the Indian Companies Act, the appellant (a bank) deposited the employees' cash security in a scheduled bank which subsequently went into liquidation. Those moneys were credited to the appellant in an account headed 'employees' cash security'. The question in the appeal, which was whether the appellant was entitled to rank in the liquidation of the scheduled bank in priority to the ordinary creditors, was decided against the appellant by Venkataramana Rao J. On appeal, it was held, per Sir Alfred Henry Lionel Leach, Chief Justice, that although the appellant held the moneys for a special purpose, yet its relationship with the scheduled bank was that of a bank and an ordinary customer, namely, that of debtor and creditor, but that the notice cast a duty on the bank not to participate in a breach of trust by the trustee.

> The learned judge pointed out that the legal effect of the notice to the bank that the moneys deposited were trust moneys was only to cast a duty on the bank not to participate in a breach of trust by the trustee.
>
> We agree with the opinion of the learned judge. The appellant would be entitled to succeed only if the bank was in the position of a trustee, if the money had been deposited for a specific purpose. The appellant has conceded that the bank was not a trustee; and we think it equally clear that these moneys were not deposited with it for a special purpose so far as the bank was concerned. The appellant held the moneys for a special purpose and was required by statute to deposit them in a bank, but the section makes no difference in the position of the bank. Its position was still that of a banker keeping an account for a customer. The bank, having notice of the trust, could not be a party to a breach of trust but that does not help the appellant. There has been no breach of trust.

[81] *Halsbury's Laws of England* (4th Ed), Reissue Vol 4 at p 301 expressed the view that even a stranger who receives property in circumstances where he has actual or constructive notice that it is trust property being transferred to him in breach of trust will also be a constructive trustee of that property.

> 585 Nature of constructive trust. A constructive trust attaches by law to specific property which is neither expressly subject to any trusts nor subject to a resulting trust but which is held by a person in circumstances where it would be inequitable to allow him to assert full beneficial ownership of the property. Such a person will often hold other property in a fiduciary capacity and it will be by virtue of his ownership of or dealings with that fiduciary property that he acquired the specific property subject to the constructive trust. A stranger who receives property in circumstances where he has actual or constructive notice that it is trust property being transferred to him in breach of trust will, however, also be a construct'ive trustee of that property.

[82] The critical ingredient of actual or constructive knowledge was also said in *Keng Soon Finance v MK Retnam Holdings Sdn Bhd (Bhagat Singh s/o Surian Singh & Ors, Interveners)* [1996] 2 MLJ 431, where Anuar J, as he then was, perspicaciously observed:

> Many of the equitable doctrines are premised upon a person's knowledge of a state of affairs being the catalyst to the raising of an equity against him. Without that knowledge, there is no justification in equity for holding him out of the full enjoyment of his rights because his 'conscience' is clear.

[83] But CIMB's conscience, could it be clear? To begin with, the CIMB Cosway branch had all prior knowledge about Pesaka's issuance of the bonds and about Pesaka's assignment of all revenue in Pesaka's conventional account at its branch to MTB to pay the bondholders, that is, even without receipt of Pesaka's notice of assignment dated 19 March 2004. Before the issuance of the bonds, the CIMB Cosway branch was one of Pesaka's two existing commercial lenders; by BPIMB facility agreements one and two respectively dated 4 December 2001 and 14 April 2003, Pesaka had assigned all revenue from the first and second government contracts to Bank Pembangunan dan Infrastruktur Malaysia Bhd and by facility agreement dated 24 April 2003, Pesaka had assigned all revenue from the third government contract to the CIMB Cosway branch. In order to assign the revenue to bondholders, Pesaka had to redeem the same from BPIMB and the CIMB Cosway branch. Accordingly, on 19 March 2004, the same day as the day of execution of the security documents, Pesaka together with KAF entered into separate release and assignment agreements with BPIMB and the CIMB Cosway branch.

[84] The preambles to the release and assignment agreement between Pesaka of the first part, KAF of the second part, and the CIMB Cosway branch of the third part, informed that Pesaka's issuance of bonds to refinance its indebtedness to the CIMB Cosway branch required the execution of that same release and assignment agreement, and that a part of the proceeds from the bonds issued would be utilised by Pesaka to repay it indebtedness to the CIMB Cosway branch under the facility agreement dated 24 March 2003. Clause 1 of

that release and assignment informed that a deed of assignment of Pesaka's rights in and to those three government contracts would be entered between Pesaka and MTB 'to secure the repayment and payment of Pesaka's indebtedness under the ABBA Bonds Issuance Facility' (see 2754AR) and that a trust deed would be entered into between Pesaka as issuer and MTB as trustee (see 2755AR). Hence, the subject and contents of the notice of assignment dated 19 March 2004 were all familiar to and within the personal knowledge of the CIMB Cosway branch who could not have been surprised to learn that Pesaka had assigned all revenue in the so-called designated account to MTB. There was also no reason for the CIMB Cosway branch to doubt the truth of the assignment to MTB as trustee, as the CIMB Cosway branch was party and signatory to the release and assignment agreement. In truth, at all material times, the CIMB Cosway branch had actual knowledge that the revenue in the so-called designated account had been assigned to MTB as trustee, and that the revenue belonged to the bondholders, so said even though notwithstanding that the enclosures to the notice of assignment might not have been forwarded to the CIMB Cosway branch. At all material times, the CIMB Cosway Branch had actual knowledge that the revenue did not belong to Pesaka. But by permitting Pesaka to transfer the revenue to others, the CIMB Cosway branch knowingly facilitated and so participated in a breach of trust. The learned judge held that the customer mandate prevailed over the notice of assignment. But it was not appreciated that although the relationship between the CIMB Cosway branch and Pesaka was that of a bank and an ordinary customer, the notice of assignment cast a duty on the bank not to participate in a breach of trust. It was also not appreciated that the CIMB Cosway branch could not ignore the interests of the bondholders. The release and assignment agreement had facilitated Pesaka's repayment of its indebtedness to the CIMB Cosway branch. By that release and assignment agreement, the CIMB Cosway branch had derived substantial profit from the bondholders. That same release and assignment agreement stipulated that Pesaka's revenue from the three government contracts would be assigned to MTB as trustee for the bondholders. And when the CIMB Cosway Branch entered into that release and assignment agreement, it consented to all the terms therein contained, which meant that the CIMB Cosway branch could not reject any notice of assignment. It was wholly pedantic to argue that the notice of assignment needed to be (formally) accepted by the CIMB Cosway branch, when the fact was that the CIMB Cosway branch had already accepted the assignment to MTB as trustee when it entered into the release and assignment agreement.

[85] By the release and assignment agreement, the CIMB Cosway branch had agreed to Pesaka's assignment of the revenue to MTB as trustee. And by the provisions of the release and assignment agreement, the CIMB Cosway branch must give effect to the assignment and the notice of assignment. The CIMB Cosway branch could not ignore the bondholders from whom it had derived substantial profit. At the very least, the CIMB Cosway branch ought to have

informed MTB that it could not act on the notice of assignment. The CIMB Cosway branch, who knew that the revenue in the so-called designated account belonged to the bondholders, was a constructive trustee of that revenue. It had gone beyond a relationship purely between Pesaka and the CIMB Cosway branch and the matter of the mandate. As constructive trustee, the CIMB Cosway branch could not permit Pesaka to transfer the revenue out from the so-called designated account. And in permitting so, the CIMB Cosway branch permitted a breach of trust and breached its duty as a constructive trustee of the revenue. For those reasons, we unanimously allow MTB's appeal against CIMB with costs. But again, we are not of the view that MTB should be entitled to a full indemnity. MTB was an express trustee while the CIMB Cosway branch was a constructive trustee. As between MTB and the CIMB Cosway branch, greater fault must lay at the door of MTB. Hence, we unanimously order CIMB to indemnify MTB to the extent of 1/3 of the total liability that MTB would have to bear, that is after deduction of the sum to be indemnified by Pesaka, Rafie, Murnina and the Amdac Group.

[86] An appellate court should be slow to interfere with the findings of a trial judge. But for the reasons given herein, we had to interfere, to right the patently unjust result reached by the trial court.

[87] As our final remark, we wish to add *en passe* that bonds is complex financial business which needs more heads than there are hats. We like to ask, had there been more heads than there were hats, could the instant bond fiasco have been averted?

KAF and MTB's appeals against Pesaka and majority shareholders of Pesaka allowed; MTB's appeal against CIMB and bondholders' cross-appeal allowed with penalty charges and costs.

Reported by Kohila Nesan